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SAN FRANCISCO

LONG & LEVIT
Attorneys at Law
MERCHANTS EXCHANGE
SAN FRANCISCO

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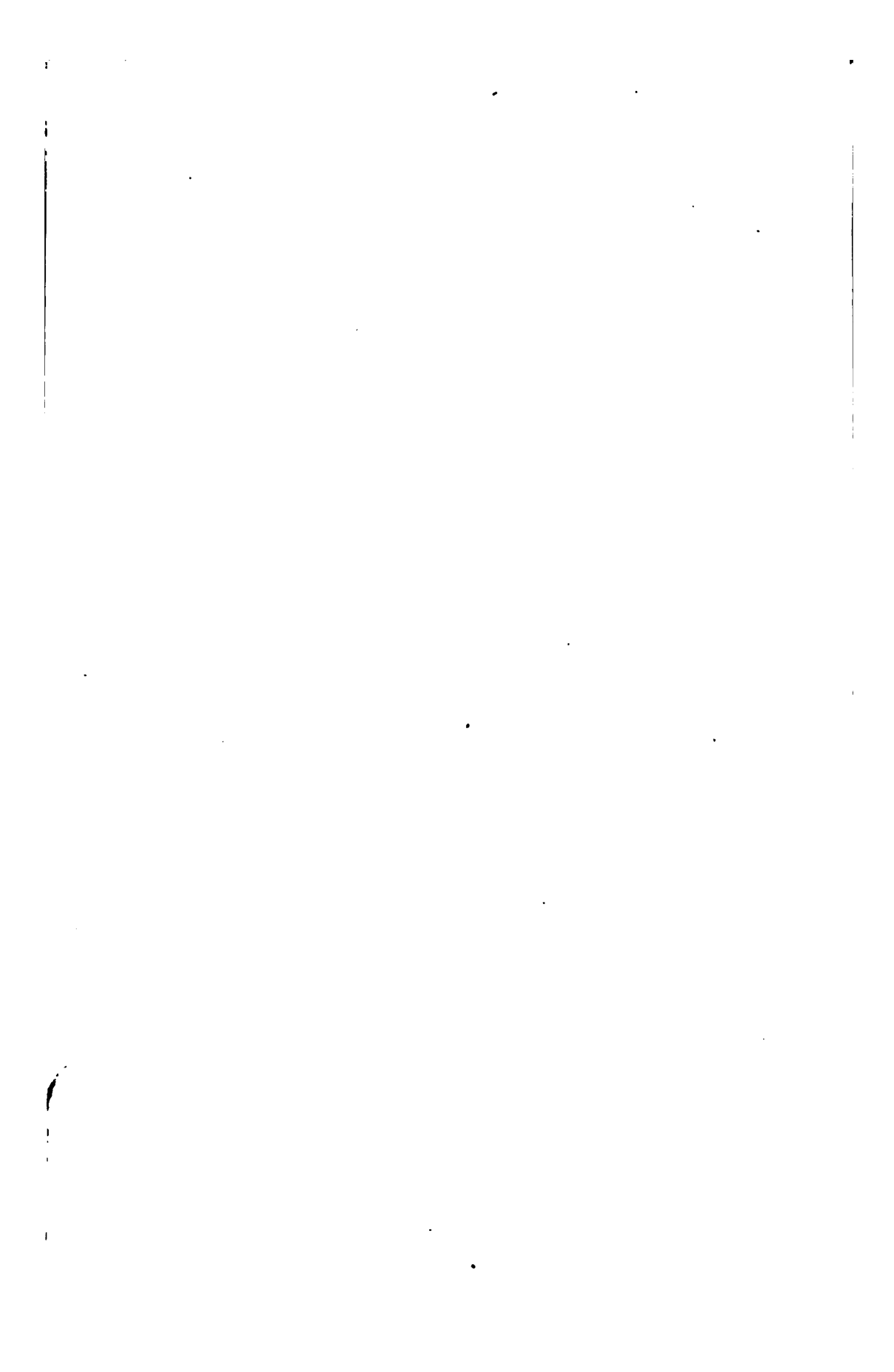
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The Fire Insurance Contract

ITS HISTORY AND INTERPRETATION

Compiled and Edited by, and Published under
the Auspices of

The Insurance Society of New York



PUBLISHED BY

THE **Rough Notes** CO.
EXTRACTS FROM THE INSURANCE CODE
MINNEAPOLIS.

ASSOCIATED WITH THE NATIONAL UNDERWRITER CO.

CINCINNATI

CHICAGO

NEW YORK

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PREFACE

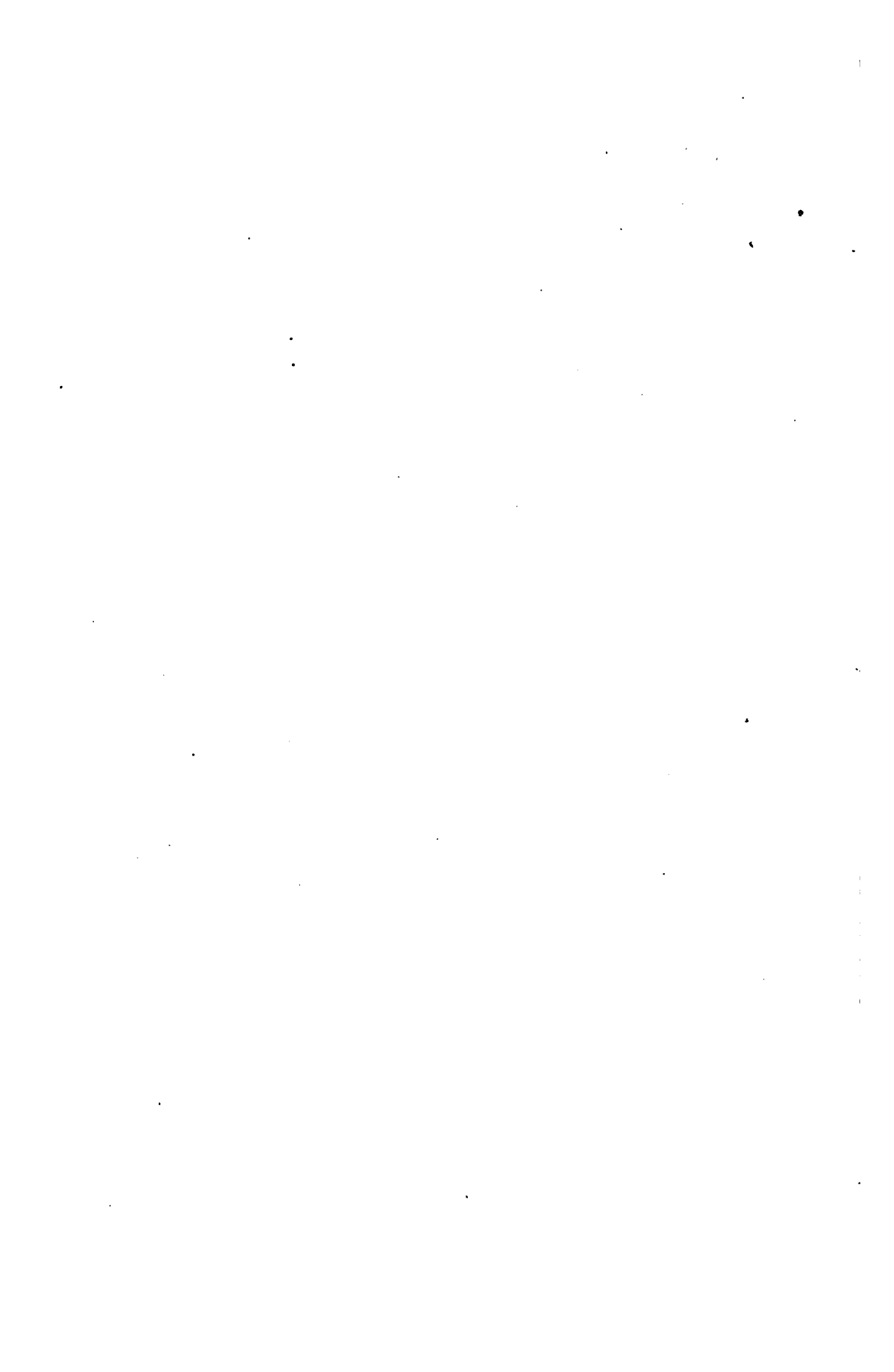
"The wisdom of any generation," says an old writer, "is the best thoughts of its learned men."

The policy contract is the most important document in the fire insurance business for it is the visible and tangible evidence of the goods sold; the bridge between company and customer; the charter of their respective rights and privileges, and the rock of safety or of wreck in their mutual relations. The simplest and clearest language is sometimes susceptible of more than one interpretation, so it is not strange that there are differences of opinion regarding portions of the standard policy.

The lectures here printed in permanent form when arranged by The Insurance Society of New York were intended to include a clear and comprehensive interpretation of the debatable features of the policy contract, such as "Cash Value," "Cancellation," "Increase of Hazard," "Liability," "What is a Fire," etc., and to illumine such questions as "Agents' Authority," "Adjustments," "Coinsurance," "Trust & Commission Clauses," "Use & Occupancy" and many others indicated in the table of contents. The course was notably successful, creating wide-spread interest, and many of the lectures found their way into all parts of the world where insurance is written.

While the Society assumes no responsibility for anything contained therein, the character and standing of those who gave so generously of their time and thought to the various subjects dealt with and the thorough and convincing manner in which each was treated is a warranty of their merit and foundation for the belief that here will be found "the wisdom of this generation" within the limits of the matters covered. It is with great satisfaction that the Society makes them available in convenient form for the benefit and use of all those to whom these subjects are of interest.

ALLEN E. CLOUGH, Chairman.
ROBERT P. BARBOUR,
WILLIAM N. BAMENT,
Publication Committee.



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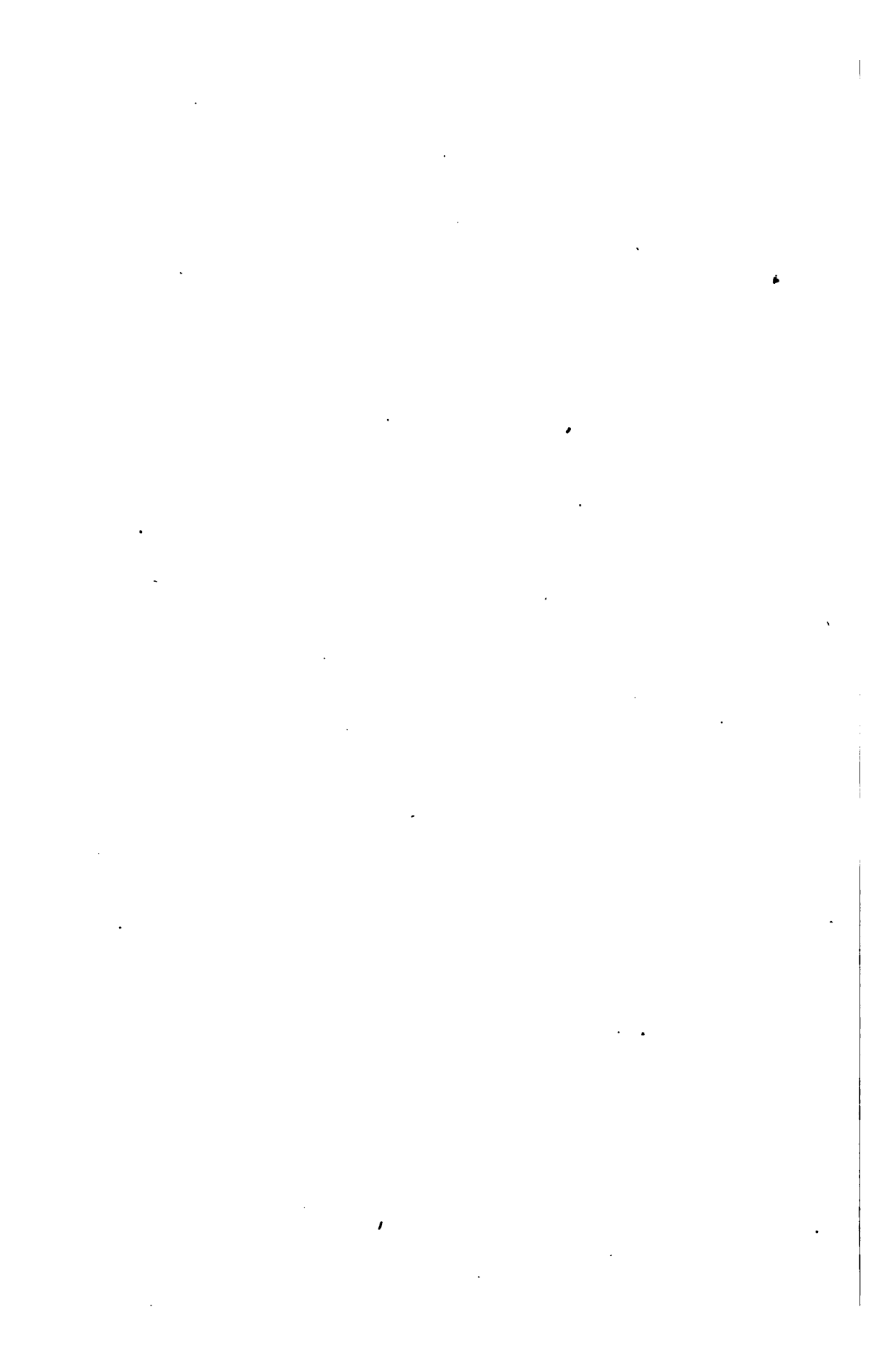
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Blank Forms used in connection with loss adjustments at San Francisco following earthquake and fire of April 18-21, 1906; Black Tom Island Casualty, July 30, 1916; Miscellaneous Forms—Appraisal Agreements; Non-Waiver Agreement; Subrogation Receipt; General Releases.

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CHAPTER I.

THE POLICY OF FIRE INSURANCE PRIOR TO THE STANDARD POLICY.

EDWARD ROCHIE HARDY

The advance of civilization, of institutions and business developments are finally crystallized in law. In fire insurance this crystallization is found in the policy of fire insurance—or to put it in other words, the policy of fire insurance is the expression in law of the development of the practice of fire insurance. The articles in this volume which follow this one all treat of the standard policy, and as a preface thereto the editors deemed it well to include a brief sketch of the policy of fire insurance from the beginning of the practice to the time of the adoption of the standard form. It is better to do this so far as possible by liberal extracts from the original documents, because the reader will thus acquire a human touch with the subject not possible in any other way.

The year 1667 marks the dividing line between prior methods of compensating a sufferer from loss by fire and the beginning of the method practically in force today. In the year 1666 occurred what is known as the Great Fire of London, and it was in London in the succeeding year, 1667, that insurance offices began to be established. The offices beginning with this latter year are distinguished by the fact that they were placed on a commercial basis precisely as the greater part of the business is conducted today. By "commercial" we mean that on the payment of certain sums policies were issued and the persons who issued the policies assumed the liability of payment for the losses in case losses occurred. In other words, they took the risk which the modern underwriter takes in the business of fire insurance. Prior to the year 1667 if the business was conducted on such a basis there is no evidence to that effect. We must look, therefore, at this period for the earliest forms of the policies of fire insurance and other documents which have a bearing thereon. It so happens that one of the earliest authentic documents is a broadside issued from the office of Barbon, whose office was established in 1667. A copy of this broadside is in the possession of the Insurance Library Association of Boston and is reproduced and treated at length in their "Bulletin" for October, 1915. This broadside is an argument for insurance and is devoted particularly

THE FIRE INSURANCE CONTRACT

to the safety of the office and its ability to meet the losses from fire which might occur. But it does not contain the policy itself nor the conditions of insurance. It is a document devoted to what we in these days are calling propaganda. This same Library is in possession of a policy issued by Barbon's office in 1684.

There were other projects in addition to Barbon's, namely, the City of London itself, mutual attempts and even other offices, and copies of their policies even earlier than the Barbon policy are in existence. These have been reproduced by various writers on the early days of insurance. We have not deemed it well to reproduce these earliest documents because those interested can secure copies of them for examination, and we wish to reproduce in this article matter which as far as possible has not before been used, and because of its more typically illustrating the policy conditions. From a private collection and also the collection in the Library of the Insurance Society of New York the material is being drawn. These collections are fairly extensive.

First of all a word as to the physical appearance of the policy. All today probably are familiar with the appearance of the standard policy which preceded the adoption of the one which is made to fit into the typewriter. It was commonly known as a blanket form because of its large size. This shape is true of the fire policy from the beginning of the business down to the change to adapt it to the typewriter. They were truly of blanket size, so to speak. They were further distinguished by having in most cases a copy of the seal of the corporation or some illustration adopted as symbolic of the business which was put at the head of the policy. Most of these illustrated a property burning and the activities of the fire department in connection therewith. Not only was this illustration a feature of the English policies, but it was equally a feature of the American policies down to the time of the adoption of the standard policy, when many of these very interesting illustrations passed away and a very prosaic looking document with which we are familiar took their place. The business lost something in picturesqueness at least by the change, however much the gain was otherwise.

The policies were intended to last for years. The first policies issued were for periods of seven, fourteen, twenty-one, and thirty-one years. And even when after about twenty years policies began to be issued with a premium payable annually there was no change either in the style of the policy or the kind of paper on which it was printed. These policies, naturally, in both countries were printed

PRIOR TO THE STANDARD POLICY

before the days of cheap methods of making paper and those which are over two hundred years old have come down in most excellent condition.

The contract of fire insurance was divided into two parts;—there was the policy itself and there were the proposals. The policy itself was a comparatively short document, as we shall show later on, while the proposals, which will also be shown, were somewhat extensive and contained nearly all of the conditions which are now found in the standard policy. When one insured his property he was given the policy and a copy of the proposals. In the case of some offices the printing of the contract as two separate documents continued down into the beginning of the 19th century. For instance, in the case of the Sun Fire Office we believe it was in 1816 that the two were united into one document. This ancient type of policy is illustrated by a copy which we now present of a policy issued by the Sun Fire Office October 23rd, 1734. It is policy No. 65251 and on the face reads as follows:

WHEREAS John Jefferson of Scarborough in the County of York carryer hath paid the Sum of Six Shillings to the Society of the Sun Fire Office in London, and has agreed to pay or cause to be paid to them at their said Office, the Sum of Six Shillings..... on the Twenty-Ninth of September 1735 and the Sum of Six Shillings.....yearly on the Twenty-Ninth of September during the Continuance of this Policy, for Insurance from Loss or Damage by Fire, on His brick and Tiled House only in Black Fryer Gate otherwise the Beast Market in Scarborough aforesaid not yet inhabited being not quite finished but intended for his own Dwelling loss not exceeding Two Hundred Pounds, And on his Household Goods and furniture therein only and not elsewhere not exceeding one hundred pounds

NOW KNOW YE, That from the Date of these Presents, and so long as the said John Jefferson shall duly pay, or cause to be paid, the said Sum of Six Shillings at the Times and Place aforesaid; and the Trustees or Acting Members of the said Society for the Time being, shall agree to accept the same, the Stock and Fund of the said Society shall be subject and liable to pay to the said John Jefferson his Executors, Administrators and Assigns, all such his Damage and Loss which he the said John Jefferson shall suffer by Fire, not exceeding the Sum of Three Hundred Pounds, according to the exact Tenor of their Printed Proposals, dated July the Ninth, 1730. IN WITNESS whereof, we (Three of the Trustees or Acting Members for the said Society) have hereunto set our Hands and Seals, the twenty-third Day of October 1734.

Sign'd and Seal'd (Being
stampt according to Act
of Parliament) in the
Presence of us,
Thos. Richardson
John Smith

Brill Fisher (Seal)
John Everett (Seal)
C Hardy (Seal)

Wm. Stockdale

It will be noted that this policy refers to their printed proposals dated July the Ninth, 1730. It was by this very specific reference to

THE FIRE INSURANCE CONTRACT

the proposals and the exact date of the proposals in question that the proposals were brought into and made a part of the policy. In time this question of the proposals being considered a part of the policy was questioned and the courts decided that the proposals were a part of the policy although brought into it merely by a reference similar to the one in this case.

There are two endorsements on the reverse side of the above policy, the first dealing with the mortgage interest reads as follows:
Indorsed

In consideration of a mortgage on the within mentioned house I the within named John Jefferson do Agree that this policy shall be for the benefit and interest of Robert Abbinson of Scarborough the mortgagee so far as relates to the better securing the money and interest thereon by him lent to me the said John Jefferson in case of any Loss or Damage by fire to the insured premises before the said Debt or Mortgage is fully satisfied or Discharged Endorsed the 31 Oct 1746 by me

Wm. Stockdale

Agent.

(Signed) John Jefferson

The second deals with a change of interest and reads as follows:

The above Named John Jefferson and Sophia his wife being both dead, Christopher Leah of Scarborough Boat Builder (by marrying one of his Daughters) and Elizabeth Jefferson Spinster, his other Daughter, are thereby become Intitled to the within mentioned premises, and therefore this Policy is to Continue and remain, for the benefit and Interest of the said Christopher Leah and Elizabeth Jefferson.

Endorsed this 30th day of January 1768

By Thos. Stockdale Agent

It is interesting to note that this policy was issued in 1734 and in 1768 the last endorsement was made. This furnishes some idea as to the method of transacting business in those days, whereby the policy itself was continued in force by the payment of the premium annually and receipts were given when such payments were made.

In connection with the cover on household goods and furniture the precise language used to definitely limit the policy to cover the property while in this house is interesting. The phrase is "Therein only and not elsewhere."

A set of the proposals of the date referred to in this policy are not available, but we believe the historical significance is better set forth by the proposals of April 10, 1710. These appear to have been the third set of proposals, but so far as known they vary slightly from the first and second sets. The proposals, naturally, were altered from time to time, and this was true so long as they were used. These proposals read as follows:

(Sun Emblem)

PROPOSALS

Set forth by the Company of London Insurers for insuring Houses,

PRIOR TO THE STANDARD POLICY

Moveable Goods, Merchandizes, Furniture and Wares from Loss and Damage by Fire.

Article 1. Every person within the Weekly Bills of Mortality of London who shall take out a policy signed by three or more of the Members of the Company of London Insurers, and seal'd with the Company's Common Seal, in form as is hereafter specified, paying 3s. 6d. for the same, whereof 1s. is the Stamp Duty, and the half-crown for the first quarter, shall be entitled to the benefit of having his or her loss and damage by fire, whether in his or her house or moveable Goods, Merchandize, Wares, Furniture, etc., under one roof, repaired and made good to him or her by the said Company according to the following Articles, continuing to pay only 2s. 6d. per quarters.

Article 2. No person insured shall ever be liable to make any farther payment or allowance towards repairing the loss and damage of any sufferer.

Article 3. Every person, who shall thus take out a Policy, shall besides the benefit of insuring his or her House or moveable goods, etc., have three times a week without any farther charge or expence left at his or her house a printed newspaper, called the British Mercury, containing all Foreign and Domestick News, an account of rising and falling of publick Stocks, payments at the Exchequer, Course of the Exchange, Port Letters, price Courant of several Commodities, with whatever else shall be thought to entertain the publick.

Article 4. Every one that would insure both his or her House and Goods, etc., must take out two distinct policies, and because two newspapers to some persons would be superfluous, one of them shall be left at any Friend's house he or she shall name.

Article 5. These proposals do extend to insure all Merchandizes, Wares, Household Goods, Furniture, etc., excepting Money, Plate, Jewels, Pictures, China Wares, Tallies and Writings.

Article 6. Towards raising a sufficient Fund for making good all sufferers' Loss and damage by Fire, 1s. shall be reserved out of every Quarteridge, which shall be received both in London and in any part of Great Britain, which in the whole will amount to a very considerable sum, much more than sufficient according to an accurate computation to make good each sufferer's whole Loss and damage.

Article 7. For the farther encouragement of all persons, there are now actually taken into the service of the said Company thirty lusty honest able bodied Firemen, who are cloathed in blue Liveries with silver Badges with the Sun mark upon their arms, who will be always at hand to assist in quenching Fires and removing Goods whenever any one shall have the misfortune to have his house on fire, who shall demand nothing for their pains of any person insured, but what they shall voluntarily give them according to their deserts. And that the houses of those persons insured may be known by the said Firemen the mark of the Sun shall be fixed upon their houses gratis.

Article 8. The true intent and meaning of these proposals is that all the money reserved in Bank according to the 6th Article shall be equally divided within 10 days after every Quarter day, among the Sufferers in proportion to their respective Losses not exceed 500 l. each policy, and where no fire happens then the whole sum to be lodged in the Bank of England till the next fire. And that every Sufferer may be sure to have the whole sum reserved in Bank, he or she may peruse the Policy Book kept at the Office where the number of policies delivered out will appear, and consequently the sum reserved in Bank for payment of claims.

Article 9. As soon as any person insured shall have his or her house or goods damaged by fire, he or she is to give notice to the Company's Clerk at their Office and within 10 days after every Quarter day there

THE FIRE INSURANCE CONTRACT

will be a General Court there, when all Claims and Losses by fire will be always faithfully paid according to the tenor of these proposals.

Article 10. When any Sufferer receive his or her claim, 5 per cent. shall be deducted out of it for defraying the charges and expenses of Officers and others employed to make inquiry how and by what means the fire happened, as is usual in other Fire Offices.

Article 11. Every Sufferer must make out his or her Loss and damage upon Oath before a Judge or Master in Chancery, in the presence of the Clerk of the Company within 10 days after the fire, and carry that Affidavit to the Minister or Church wardens of the parish in which the Fire broke out, and some other eminent Housekeepers in the said parish, especially such as live near the place where the fire began but have themselves sustained no damage thereby, and are best acquainted with the person, reputation and circumstances of the said Sufferer, who shall sign a certificate that they do know or believe nothing to the contrary, but that the Sufferer has really and by misfortune lost by fire the sum mentioned in his or her Affidavit, upon producing which to the Company he or she shall receive his or her claim. But if there appears any fraud or perjury in such Sufferer he or she shall be excluded from any right or Interest in these proposals.

Article 12. If any person insured removes his or her habitation he or she must give notice, and have his or her policy changed at the Office paying the Stamp Duty only.

Article 13. Every person insured shall pay his or her Quarteridge within 10 days after every Quarter day upon forfeiture of his or her policy, and the Sun Mark which the Company shall have free liberty to take down.

Article 14. When any person pays his or her Quarteridge, a printed receipt will be given for the same signed by two or more of the Company of London Insurers.

Article 15. Every person insured may relinquish at pleasure, and if he or she dies the interest in his or her policy shall continue to his or her Executor or Administrator so long as they continue to pay their Quarteridge.

Article 16. Any person desiring to insure either his or her house or moveable goods, without having the British Mercury shall pay but 3s. for his or her policy and first Quarter, and be entitled to all the other benefits above mentioned continuing to pay 2s. per Quarter.

We illustrate further the use of the Proposals and Policy as separate documents by a policy No. 1179 issued by the Hartford Insurance Company to cover household furniture in a dwelling owned by the North Ecclesiastical Society in Hartford.

The proposals are dated July 27, 1810, and are endorsed on the back:

No. 1179
North Ecclesiastical Society Hfd.
For one year from
The 13 Dec 1823
Premium 10.00
Policy .50

\$10.50

This endorsement is in ink and then below in pencil:

"Duplicate issued Dec 13, 1837
Instead of Renewal Receipt"

We quote first the proposals and then the policy itself:

PRIOR TO THE STANDARD POLICY

HARTFORD FIRE INSURANCE COMPANY.

PROPOSALS

For Insuring

Houses, Buildings, Stores, Ships in Harbour, and on the Stocks, Goods
Wares, and Merchandize

FROM LOSS OR DAMAGE BY FIRE

The Hartford Fire Insurance Company having been incorporated by the Legislature of the State of Connecticut with a capital of One Hundred and Fifty Thousand Dollars—with a power of enlarging the Capital to Two Hundred and Fifty Thousand Dollars: and the capital of One Hundred and Fifty Thousand Dollars being already paid and secured, to be paid according to law, the directors now offer to the public the following terms on which they propose to conduct the business of the Company.

As all classes of citizens are exposed to great calamities from fire, we presume that prudence will induce them to pay the small premium which is required for an indemnity against such accidents. The practice of procuring Insurance against loss from fire, has already become very general through this country, and the Company are confident that the extent and solidity of their funds, and the fairness, liberality and promptitude with which they have adjusted the claims of sufferers, will ensure the confidence and patronage of this and the neighboring States.

An insured person will be liable to make good the Losses of others; but in case of Fire, the sufferer will be fully indemnified to the amount insured. The Company also make good losses on property burnt by Lightning.

CLASSES OF HAZARDS, AND RATES OF ANNUAL PREMIUMS FOR INSURANCE AGAINST FIRE

No. I

Hazards of the First Class

Brick or Stone Buildings, covered with slate, tiles or metal.

Goods not hazardous contained in such Buildings.

For sums not exceeding 10,000 Dollars in one risk 25 Cents per 100 Dollars, per ann.

No. II

Hazards of the Second Class

Brick or Stone Buildings, covered with wood.

Goods not hazardous contained in such Buildings.

Hazardous Goods contained in buildings of the First Class.

For sums not exceeding 10,000 Dollars in one risk, 37½ Cents for 100 Dollars per ann.

No. III

Hazards of the Third Class

Buildings the sides of which are part brick or stone and part of wood.

Goods not hazardous, contained in such buildings.

Hazardous Goods contained in buildings of the Second Class.

For sums not exceeding 10,000 Dollars in one risk 50 Cents per 100 Dollars per ann.

No. IV

Hazards of the Fourth Class

Buildings the sides of which are entirely of wood.

Goods not hazardous, contained in such buildings.

Hazardous Goods contained in buildings of the Third Class.

For sums not exceeding 10,000 Dollars in one Risk 75 to 100 Cts per 100 dolls. per ann.

THE FIRE INSURANCE CONTRACT

Ships in Port, or their Cargoes, Ships repairing or Building,
may be insured against Fire.

This manner of Classing Hazards will give a general idea of the Rates of insurance, but there will necessarily be an increase of Premium in all cases where the local situation, and other circumstances increase the Risk; such as joining, or being contiguous to wooden buildings, or Buildings occupied in carrying on hazardous Business—distance from Water—no Engine or Fireman in the town or place, etc. etc.—The Premiums may also, in some cases, be reduced on Wooden Buildings in the country, when standing single or detached, or attended with circumstances of peculiar security. Larger sums than 10,000 Dollars may be insured by special agreement.

Soap Boilers, Tallow Chandlers, Brewers, Bakers, Rope Makers, Sugar Refiners, Distillers, Chemists, Varnish Makers, Stable Keepers, Tavern Keepers, China, Glass or Earthenware Sellers, Oil and Colourmen, Turpentine Works, Paper Mills, Printing Houses, Coopers, Carpenters, Cabinet Makers, Coach Makers, Boat Builders, Ship Chandlers, Apothecaries, Theatres, Mills, and Machinery, and all Manufactories, that use Fire Heat, are deemed extra hazardous, and must be particularly described in the Policy; and for all such risks an additional premium will be required.

CONDITIONS OF INSURANCE.

I. ALL applications for Insurance must be made at the office of the Company, in writing; and the subject offered for Insurance accurately described.

II. If the property offered for Insurance is within the District of a Surveyor of this Company, he will examine and report thereon; but if not within any such District then the Applicant must himself furnish an accurate and just description thereof, viz. of what Materials each Building is constructed; whether occupied as Private Dwellings, or how otherwise; where situated; the Name of the Present Occupiers; how situated with respect to other buildings:—And in the Insurance of Goods, Wares and Merchandize, the Place where the same are deposited, is to be described; also; whether such goods are of the kind denominated Hazardous, and whether any Manufactory is carried on in the Premises, all which is to be certified and attested in such manner as the nature of the case may admit. And if any Person or Persons shall insure his or their Buildings or Goods, and shall cause them to be described in the Policy otherwise than they really are, so as the same be charged at a lower Premium than is herein proposed; or if such Description be false or fraudulent, such Insurance will be void and of no effect.

III. Goods held in Trust, or on Commission, are to be declared as such; otherwise the Policy will not extend to cover such Property.

IV. Every Policy of Insurance, made by this Company, shall be sealed with its Seal, and signed by the President and Secretary; and the person for whose interest the Insurance is made, must be declared and named therein; nor can any Policy, or interest therein be assigned, but by consent of the Company, expressed by endorsement thereon.

V. No Insurance will be considered as made or binding, until the Premium is paid.

VI. Persons insuring Property with this Company, and who have already made other Insurance on the same Property, shall give notice thereof in writing at the Company's Office, before, or at the time of the Execution of the Policy: and persons who after Insuring Property with this Company, have Insurance made on the same property elsewhere, shall with all reasonable diligence, notify the same in writing at the Office of the Company, and have the same endorsed on the Policy, or otherwise acknowledged in writing; in default whereof, the Policy shall cease and be of no effect: and in case of Loss, each Party Insuring shall be liable to payment of a rateable proportion only of the loss or damage which may be sustained.

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VII. No Loss or Damage by Fire will be paid, that may happen or take place in consequence of any Earthquake, Invasion, Civil Commotion, Riot, or Military or Usurped Power whatever.

VIII. Books of Accounts, Written Securities, Notes, Bills, Bonds, Deeds, Ready Money, or Bullion cannot be Insured.

IX. Jewels, Plate, Medals, or other curiosities, Paintings and Sculptures are not included in any Insurance, unless such articles are specified in the Policy.

X. All persons insured by this Company, sustaining any loss or damage by Fire, are forthwith to give notice to the Company and as soon as possible, to deliver in as particular an account of their Loss or Damage, signed with their own hands, as the nature of the case will admit, and make proof of the same by their oath or affirmation, and by their books of accounts, and other proper vouchers, as shall be reasonably required: and shall make oath, whether any and what other Insurance is made on the same property; and shall procure a Certificate, under the hand of a Magistrate, Notary Public, or Clergyman, most contiguous to the spot where the fire happened, (and not concerned in such loss) that they are acquainted with the character and circumstances of the person or persons insured; and do know, or verily believe, that he, she or they, really and by misfortune, and without fraud or evil practice, have sustained by such fire, loss and damage to the amount therein mentioned; and, until such affidavits and certificates are produced, the loss shall not be payable. Also, if there appears any fraud, or false swearing, the claimant shall forfeit his claim to restitution or payment by virtue of his Policy.

XI. In case any difference shall arise, touching any Loss or Damage, it may be submitted to the Judgment of Arbitrators, indifferently chosen, whose award in writing shall be binding on the parties. And when any Loss or Damage shall happen, the Company shall pay for the same in sixty days after the Loss shall have been ascertained and proved, without allowance of discount, fees or any deduction whatever.

XII. Insurance may be made for seven years, by paying the premium for six years, and for a less number of years than seven, a reasonable discount will be allowed.

Hartford, July 27, 1810.

The Policy is as follows:

No. 1179

THIS INSTRUMENT OR POLICY OF ASSURANCE WITNESSETH, That the HARTFORD FIRE INSURANCE COMPANY, in consideration of ten DOLLARS to the said Corporation paid, the Receipt whereof is hereby acknowledged, Hath agreed to Insure, and Doth hereby agree to Insure,

The North Ecclesiastical Society in Hartford against Loss or Damage by Fire, to the amount of Two Thousand Dollars on their Dwelling House two stories high built of Wood situate on Village Street next north of their Meeting House in this City—privileged to be occupied by two families and further described in Application filed No. 1179 with privilege of erecting temporary Stoves in the House.

IN CONSIDERATION of which premises, the Hartford Fire Insurance Company Doth hereby covenant and agree with the said assured their Executors, Administrators and Assigns, to pay and satisfy all Loss or Damage which the Assured or Assigns, shall or may sustain by Fire, upon the property hereby Insured not exceeding in amount the said Sum of Two Thousand Dollars One year from the Date hereof and before the Thirteenth day of December Eighteen hundred & twenty four at noon.

AND THIS CORPORATION doth further covenant and agree to and with the said Assured their Executors, Administrators and Assigns, that this Assurance shall continue and be in force from the expiration

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of the time before mentioned for its duration, for so long as the said Assured, or their Assigns shall continue to pay the like Rate of Premium, as hath been paid for this Insurance, for so long as this Corporation shall agree to accept, and actually receive the same from the Assured or their Assigns. PROVIDED, That the premium for a continuance of the Insurance, shall be actually paid by the Assured or their Assigns to this Corporation before the day limited for the termination of the Risk, and such payment endorsed on this Policy, or a Receipt therefor given by this Corporation. And it is further agreed, that the amount of such Loss or Damage, as the Assured or their Assigns shall be entitled to receive by virtue of this Policy, shall be paid within Sixty Days after notice and proof thereof made by the Assured, in conformity to the Proposals of this Corporation annexed to this Policy.

PROVIDED ALWAYS, AND IT IS HEREBY DECLARED, That this Corporation shall not be liable, or bound to pay the said Assured in this Policy named, their Executors, Administrators, or Assigns, for any Loss or Damage by Fire, that may happen or take place in consequence of any Earthquake, Invasion, Civil Commotion, Riot, or any Military or Usurped Power whatsoever. PROVIDED ALSO, That in case the Assured shall have already any other Insurance on the hereby Insured Premises they shall notify the same to this Corporation, before or at the time of the execution of this Policy, and cause the same to be endorsed thereon, or this Assurance shall be void and of no effect: and if the said Assured or their Assigns shall hereafter make any other Insurance on the hereby Insured Premises they shall with all reasonable diligence, notify the same to this Corporation, and have the same endorsed on this Instrument, or otherwise acknowledged in writing, by this Corporation, or in default thereof this Policy shall cease and be of no further effect. AND IT IS FURTHER DECLARED AND AGREED, That in case of any other Insurance being made upon the premises hereby insured, either prior or subsequent to the date of these Presents, the Assured shall not, in any case of Loss or Damage, be entitled to demand or recover, on this Policy, any greater proportion of the Loss sustained than the Amount hereby Insured shall bear to the whole amount of the several Insurances made, or to be made, on the Premises Insured by this Policy. AND IT IS AGREED AND DECLARED, to be the true intent and meaning of the Parties hereto, and of these Presents, that in case the above mentioned House shall at any time after the making, and during the time of this Policy would otherwise continue in force, be appropriated or used for the purpose of carrying on or exercising the trade, business or vocation of a Soap Boiler, Tallow Chandler, Brewer, Malster, Baker, Rope Maker, Sugar Refiner, Distiller, Chemist, Varnish Maker, Paper Maker, Stable Keeper, Tavern Keeper, China, Glass, or Earthen-ware Seller, Oil and Colournmen, Printer, Cooper, Carpenter, Cabinet Maker, Coach Maker, Boat Builder, Ship Chandler, or Apothecary, or any Manufactory which requires the use of Fire Heat, or shall be used for the purpose of Storing therein Gunpowder, Hemp, Flax, Oil, Pitch, Tar, Rosin, Turpentine, Spirits of Turpentine, Aqua Fortis, Straw, Hay, Grain Unthreshed, Fodder, Distilled Spirits, or other Hazardous Goods, and then and from thenceforth, so long as the said House shall be appropriated or used for any or either of the purposes aforesaid, these Presents shall cease and be of no force or effect, UNLESS OTHERWISE SPECIALLY AGREED BY THIS CORPORATION, and such agreement be signified in writing. And it is moreover Declared, That this Policy, or the Insurance hereby intended to be made, does not comprehend or cover any Books of Account, Written Securities, Deeds, or other evidences of title to Lands, Bonds, Bills, Notes, or other Evidences, of Debts, Money, or Bullion.

AND IT IS UNDERSTOOD AND AGREED, as well by this Corporation, as by the Assured, named in this Policy, and all others who may become interested therein, that this Insurance is made and accepted

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in reference to the Proposals which accompany these Presents, and in every case the said Proposals are to be used to explain the rights and Obligations of the Parties, except so far forth as the Policy itself specially declares those Rights and Obligations.

IN WITNESS WHEREOF, The said Corporation, have caused their Common Seal to be affixed to these Presents, and the same to be signed by their President and Secretary the 13 day of December in the year of our Lord one thousand eight hundred and twenty-three.

N. B. This policy is not assignable, unless
by consent of the Corporation manifested
in writing.

Attest, Walter Whitehill Sec.

Nath. Terry Pres.

It will be noted that in two places in the Policy the Proposals are referred to.

It is unnecessary, perhaps, to point out that many of the provisions contained in the proposals and the policy are those which are in force today.

Another important feature which distinguished these policies was the inclusion in first the proposals and later the policy itself of the various classes of hazards into which buildings and contents were divided, with the rates or annual premiums applying thereto. This division of the business originated in Great Britain over two centuries ago and has continued in force in some parts of the world down to the present time. But where schedule rating has been adopted it has superseded the old division into classes and hazards. The earliest groupings or classes were called "Common Insurances," "Hazardous Insurances," "Doubly Hazardous Insurances." Two subdivisions were introduced as a further development, one coming between "Common" and "Hazardous," and the other between "Hazardous" and "Doubly Hazardous," thus making five in all.

In the United States this method was taken over and, as in Great Britain, was developed so that in time there came to be eight classes of hazards, as they were termed, these dealing with different types of construction of buildings, while the goods therein were thus classified: Not Hazardous, Hazardous, Extra Hazardous, Special and Country Houses. The Firemen's Insurance Company of New York in its policy 10,043, dated July 6, 1832, has this feature of the policies set forth in a fully developed form, and we therefore take it as our illustration of this important feature of the policy.

PROPOSALS FOR INSURANCE

On Dwelling-Houses, Warehouses, and other Buildings; on Merchandise, Machinery, Furniture, and other Personal Property,

AGAINST LOSS OR DAMAGE BY FIRE.

CLASSES OF HAZARDS, AND RATES OF ANNUAL PREMIUMS.

1st Class of Hazards.—Buildings of Brick or Stone, covered with Tile,

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Slate, or Metal, the window shutters of solid Iron; gutters and cornices of Brick, Stone, or Metal; party walls, above the roof, 25 cts. per \$100.

2nd Class of Hazards.—Buildings of Brick or Stone, covered with Tile, Slate, or Metal; party walls above the roof, 30 cts. per \$100.

3rd Class of Hazards.—Buildings of Brick or Stone, roofs three-fifths of Tile, Slate, or Metal, the rest Wood; party walls above the roof, 25 cts. per \$100.

4th Class of Hazards.—Buildings of Brick or Stone, covered with Wood; party walls above the roof, 45 cts. per \$100.

5th Class of Hazards.—Buildings of Frame, filled in with Brick to the peak, front of Brick. 60 cts. per \$100.

6th Class of Hazards.—Frame Buildings filled in with Brick to the peak or with Brick front filled in to the plate, 75 cts. per \$100.

7th Class of Hazards.—Frame Buildings, filled in with Brick to the plate, or with hollow walls and Brick front, 84 cts. per \$100.

8th Class of Hazards.—Buildings entirely of Wood, 90 cts. and upwards per \$100.

A deduction of three cents allowed on all buildings of the second class situated fronting, and within 150 feet of the river, or on slips within 50 feet of the water.

All Brick or Stone Buildings in which the party walls are not carried through the roof, to pay five cents additional.

NOT HAZARDOUS

Goods not hazardous are to be insured at the same rates as the buildings in which they are contained, and are such as are usually kept in dry goods stores; including coffee, cotton in bales, flour, household furniture, indigo, paints ground in oil, potash, rice, spices, sugars, teas, threshed grain, and other articles not combustible.

HAZARDOUS

The following trades and occupations, goods, wares, and merchandise, are considered hazardous, and are charged 12½ cents per \$100, in addition to the premium above named, for each class: viz.

Basket-sellers, Block and Pump-makers, Coppersmiths, china or earthen, or glass-ware or plate glass, in packages, boxes, or casks, flax, Grocers with any hazardous articles, gun-makers or smiths; Hat-finishers, hay pressed in bundles, hemp, looking glasses in packages or boxes, Manilla grass, milliners' stock, oil, paper in reams, paper-hangings, pitch, porter-houses, rags in packages, Sail-makers, saltpetre, spirituous liquors, sulphur, tallow, tar, taverns, turpentine, victualling shops, window glass in boxes, and wooden ware sellers.

EXTRA HAZARDOUS

The following trades and occupations, goods, wares, and merchandise, are deemed extra hazardous, and will be charged 25 cents and upwards per \$100, in addition to the premium above specified for each class: viz.

Alcohol, Apothecaries, aqua-fortis, basket bleachers or makers, Blacksmiths, Boat builders, Booksellers' stock, Brass-founders, Brush-makers, Cabinet makers' stock, Carvers, china, or earthen, or glassware or looking glasses unpacked, and buildings in which the same is packed or unpacked, Chocolate makers, Colourmen's stock, Comb-makers, Confectioners or their stock, Coopers, Druggists, etc., Founders, Grate-makers, hats of chip or grass or strain bleaching, Jewellers' stock, lamp manufactories, lime unslaked, Mathematical or Musical or Optical Instrument Sellers' or Perfumers' stock, morocco manufactories, Painters, pictures, Platers, or plated ware manufactories, prints, Printers of newspapers, rag stores, Ship-chandlers, Silversmiths' or Stationers' stocks, Soap-makers, spirits of turpentine, stove manufactories, Tin or sheet-iron

PRIOR TO THE STANDARD POLICY

workers, tobacco manufactories, Toy Shopkeepers' stock, Turners, upholstery manufactories, varnish, Watchmakers' stock, tools, etc., window or plate-glass unpacked.

SPECIAL

Mem. Bakers, Bark-mills, Frame-makers, Fulling-mills, Grist mills, Gunpowder, Hat manufactories, Houses building or repairing, Ink or Ivory-black, or Lamp-black, Manufactories, Livery-stables, Lumber or Mahogany Yards, Malt-houses, Metal and other Mills of all kinds, Musical Instrument Makers, Oil-mills, Oil-boiling houses, Paper mills, Piazzas, and Privies of wood, Printers of books and jobbing, Rope-makers, Sash-makers, Saw or Snuff-mills, Ship-builder's stocks in the yard, Ships or other vessels in port, or their cargoes, or when building or repairing, stables, steam-engines or boats, Sugar-refiners, Tallow-melters, or Chandlers, Tanners Tar-boiling houses, Theatres, or other places of public exhibition, Timber-Yards, Turpentine-manufactories, Type Founders, Varnish-makers, Wool-mills, and generally all manufacturing establishments, and all trades requiring the use of fire heat, not before enumerated.

COUNTRY HOUSES

N. B. Country houses, standing detached from other buildings, though of the 6th, 7th or 8th class will be insured at 60 to 90 cents per 100 Dols. Barns and Stables in the country at 85 cents and upwards.

Ships in Port, or their Cargoes; and ships building or repairing, may be insured against Fire.

We have now seen the three important features of the policy prior to the standard policy. First there was the policy itself, second, the proposals containing most of the conditions, which was for many decades a separate document but later became united with the policy itself; and third, the division of the buildings into different classes and the division of contents into different groupings with the rates, except for the specials, applying thereto. The union of these three into one document represents in general the form of the policy of insurance prior to the standard policy.

Side by side or parallel therewith there was the use of a policy which was simple in form when compared with the type we have been considering. We illustrate this type by a policy of the American Fire Insurance Company of Philadelphia which took effect the 13th day of July, 1810. It reads as follows:

"This Policy of Insurance Witnesseth, That Daniel Ley of the City of Philadelphia Sugar Baker hath paid to

THE AMERICAN FIRE INSURANCE COMPANY,

Thirty seven Dollars and Fifty cents

Premium for insurance (not exceeding in each case the sum or sums hereinafter recited) upon the property herein described, viz.

On his stock in Trade including utensils appertaining to the Business of Sugar Baker contained in a two Story Brick Building situate on the east side of Sterling Alley between Third and Fourth, Cherry and Race Streets in the said City.

NOW KNOW ALL MEN, BY THESE PRESENTS, That in consideration thereof, The Capital Stock, Estate and Securities of THE AMERICAN FIRE INSURANCE COMPANY shall be subject

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liable to pay, make good and satisfy unto the said Assured his Heirs, Executors, and Administrators, all such damage or loss which shall or may happen by Fire to the property above-mentioned, from the day of the date hereof to the full end and term of one year not exceeding the sum of Three Thousand Dollars unless the said Company shall forthwith give directions for putting the said stock and utensils in as good a state as they were in before they were so injured by Fire, or shall make good the said loss or damage, by paying therefor, according to an estimate thereof to be made by arbitrators indifferently chosen, whose award, in writing, shall be conclusive and binding on all parties: or provided the said stock and utensils shall be wholly destroyed by Fire, within the term aforesaid, that then the Capital Stock, Estate and Securities of the said Company shall be subject to pay to the said assured his Heirs, Executors, Administrators or Assigns, the entire sum of Three Thousand Dollars Provided nevertheless, and it is hereby declared to be the true intent and meaning of this Policy, that the Stock, Estate and Securities of said Company shall not be subject or liable to pay, or make good to the assured, any loss or damage by Fire which shall happen by any invasion, foreign enemy, riot or civil commotion, or any military or usurped power whatever: . . . and this policy shall remain suspended and be of not effect, in respect to any loss or damage which shall happen or arise during the time of any such accident or disturbance:- Provided also, that this Policy shall not take place or be binding on the said Company until the premium is paid, or in case the property herein mentioned is already or shall be hereafter insured by any Policy issued by this Company, or by any agent thereof, or by any other Insurance Company, or by any private insurers, such other insurance must be made known at this office, and mentioned in or indorsed on this Policy, otherwise this Policy to be void; Or if the Building above mentioned shall at any time, when such Fire shall happen, be in the whole or in part occupied (with the knowledge or consent of the said assured) by any person who shall use or exercise the trade or business of a Carpenter, Joiner, Cabinet Maker, Coach Maker, Cooper, Tavern Keeper, Stable Keeper, Baker, Ship Chandler, Boat Builder, Rope Maker, Malt Drier, Brewer, Distiller, Tallow Chandler, Soap Maker, Apothecary, Chemist, Varnish Maker, Oil and Colorman, Picture or Print Seller, Printer, Cotton Spinner, or any Mills or Machinery, or if the same shall be made use of for storing or keeping of Hemp, Flax, Tallow, Pitch, Tar, Turpentine, Rosin, Saltpetre, Sulphur, Gunpowder, Spirits of Turpentine, Shingles, Hay, Straw, Fodder of any kind, Corn unthreshed, Oil, Aqua Fortis, then, in all or any of the said cases, this Policy and every clause, article and thing herein contained, shall be void and of no effect.

In Witness Whereof, the common seal of the said Corporation is hereunto affixed this thirteenth day of July in the year of our Lord one thousand eight hundred and ten.

SEAL Edward Tuck (?)
Secy

Wm. Jones President

This comparatively simple form continued in some cases down to practically the time of the adoption of the standard policy and is illustrated by a policy of the Shoe and Leather Insurance Company, of Boston, dated the first day of January, 1873. It reads as follows:

SHOE AND LEATHER INSURANCE COMPANY.

No. This Policy of Assurance Witnesseth, That the Shoe and
Leather Company, of Boston, do by these presents, cause

CHRISTOPHER FOSTER

To Be Assured Five Thousand Dollars Viz.
1% \$4000. on his two story brick Dwelling House, situate

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No. 559 Shawmut Avenue, In Boston, and
1-1/4% \$1000. on Household Furniture & Wearing Apparel, contained therein.

Jan 17/77

Payable in case of loss to William Minot, Trustee and Mortgagee,
H. B. White Secy.

OTHER INSURANCE PERMITTED WITHOUT NOTICE TILL REQUIRED

against all loss or damage to the same by fire, originating in any cause except Invasion, Foreign Enemies, Civil Commotions, Riots, or any military or usurped power whatsoever, for and during the term of five years commencing the risk the first day of January one thousand eight hundred and seventy-three at noon, and to continue until the first day of January one thousand eight hundred and seventy-eight at noon, and no longer, the said loss to be estimated according to the true and actual value of said property at the time the same shall happen—provided that the said Company shall not be liable for more than the sum insured, in any case whatever.

SUM INSURED—\$5,000.

And the assured hereby covenants and engages, that the representation given in the application for this insurance contains a just, full and true exposition of all the facts and circumstances in regard to the condition, situation, value and risk of the property insured, so far as the same are known to the assured and material to the risk; and that if any material fact or circumstance shall not have been fairly represented, or if the said property should be removed without necessity to any other place, or if the situation or circumstances affecting the risk thereupon shall be so altered or changed by or with advice, agency or consent of the assured, as to increase the risk thereupon; or if the said property should be sold; or if this Policy should be assigned without the consent of the Company; or if the assured shall make any attempt to defraud the said Company, that, in every such case, the risk thereupon shall cease and determine, and the Policy be null and void—unless confirmed by a new agreement thereupon, written after a full knowledge of such facts and circumstances.

And the assured further covenants and agrees that in case of any loss or damage, the Company shall have the right to enter upon and rebuild or repair the premises, or replace the property lost or damaged, with other of the same kind and equal goodness, at any time within ninety days after notice of the loss, or to pay for the same in Sixty days after proof of the loss & damage thereon.

And it is further agreed, that in case there should be any other Insurance on the property hereby assured, whether prior or subsequent, the assured shall be entitled to recover on this Policy no greater proportion of the loss sustained than the sum hereby insured bears to the whole amount insured thereon. And whenever this Company shall pay any loss, the assured agrees to assign over all his rights to recover satisfaction therefor from any other person or persons, town or other Corporation, or prosecute therefor at the charge and for account of the Company, if requested.

PREMIUM \$52.50.

And in consideration of the sum of Fifty-two 50/100 Dollars to them paid, the said Company do hereby bind the Capital Stock and other common property thereof, to the assured, his executors or administrators, for the payment of all sums that may become due under this Policy.

This Policy may be cancelled at the office of the Company, and a return premium, according to the short-term rates current in Boston for even months, returned the assured. The Company also reserve the right to cancel this Policy by giving the assured ten days notice.

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And in case any Gunpowder, or other article subject to legal restrictions, shall be kept in quantities greater than the law allows, or in a manner different from that prescribed by law, this Policy is to be null and void.

And in case Steam-power is used in and about the property insured, and the boilers should burst; or any property insured is struck by lightning, this Company is not to be liable unless Fire ensues, and then for the loss or damage by fire only.

And in case any difference of opinion should arise between the parties hereto, the subject shall be referred to three disinterested men, one of whom to be chosen by each, out of three to be named by the other party, and the third by the two so chosen.

N. B. Bills of Exchange, Notes, Accounts, and Evidences or Securities of Property of any kind, Books, Wearing Apparel, Plate, Furniture, Money, Jewels, Medals, Paintings, Sculpture, and other curiosities, are not to be insured unless by special agreement.

In Witness Whereof, the President of the said Insurance Company hath hereunto subscribed his name, and caused the same to be countersigned by their Secretary, at their office in Boston, this first day of January one thousand eight hundred and seventy-three.

H. B. White, Secretary.

John C. Abbott, President.

No alienation of the Property shall vitiate the right of the Mortgagee to recover any loss under this Policy.

The device of emphasizing certain features of the policy by the use of capitals for the initial word was developed as shown by a policy of the Corn Exchange Insurance Co. of Philadelphia, dated the 18th day of July, 1860. Four items were thus emphasized in this policy. They were as follows:

CAMPHENE, Spirit Gas or "Burning Fluid," when used in stores, warehouses, shops or manufactories as a light, subjects the goods therein to an additional charge, and permission for such use must be endorsed in writing, on the Policy.

GUNPOWDER, **PHOSPHOROUS** and **SALTPETRE**, are expressly prohibited from being deposited, stored, or kept in any building insured, or containing any goods or merchandise insured by this Policy, unless by special consent, in writing, on the Policy.

PLATE GLASS doors or windows, when the plates are of the dimensions of three square feet or more, are subject to an extra premium, and must be separately and specifically insured.

FENCES and **PRIVIES**, also store furniture and fixtures must be separately and specifically insured.

Another method was by using the figure of a hand with the index finger pointing to the emphasized paragraph. This is illustrated by the policy of the Metropolitan Insurance Company of the 29th of July, 1874. Some six items were thus distinguished and they were as follows:

Gas.—The generating or evaporating within the building, or contiguous thereto, of any substance for a burning gas, or the use of gasoline for lighting, is prohibited under this Policy unless permitted in writing hereon.

Fences and other Yard Fixtures also Store Furniture and Fixtures are not insured under the within Policy, unless separately and specifically mentioned.

Builders' Risk.—The working of carpenters, roofers, tinsmiths, gas-fitters, plumbers, or other mechanics, in building, altering, or repairing the premises named in this Policy will vitiate the same, unless permis-

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sion for such work be indorsed in writing hereon, except in dwelling-houses only, where five days are allowed in any one year for incidental repairs, without notice or endorsement.

☞ This Policy does not cover Frescoed work or Gilding on walls, and ceilings, unless separately and specifically insured.

☞ Plate Glass in doors and windows, when the plates are of the dimensions of three feet square or more, are to be separately insured, at a rate not less than 150 cents.

☞ And It Is Hereby Understood And Agreed, by and between this Company and the assured, that this Policy is made and accepted in reference to the foregoing terms and conditions, and to the classes of hazards and memoranda printed on the third page of this Policy, which are hereby declared to be a part of this contract, and are to be used and resorted to in order to determine the rights and obligations of the parties hereto, in all cases not herein otherwise specially provided for in writing.

A third method was the use of red ink for the captions of the various paragraphs of the conditions. This was the case in the policy from which the above extract has been made.

The form, of which so much is made at the present time, was a comparatively simple matter in the days prior to the standard policy. For instance, one policy states: "\$2,000, on his Household Furniture, useful and ornamental, wearing apparel, plates and plated ware, and printed books contained in the brick building covered with slate situate in this city at 161 Hudson Street." The use of those seven familiar words "on his household furniture, useful and ornamental," shows that the present language of the normal household furniture form has a very respectable lineage.

In another case the form states "On his stock in Trade including utensils appertaining to the Business of Sugar Baker contained in a two story brick building situate on the east side of Sterling Alley between Third and Fourth, Cherry and Race Streets in said city." This was a confectioner's shop, but fancy the language that would be used today in covering that simple risk.

Another reads:

"Seven Thousand Dollars upon his Stock in Trade, Consisting of Mahogany Boards and Plank, Veneer, and Ironmongery, viz.

Six Thousand Dollars upon Mahogany Boards and Plank Contained in the Yard in the Rear of his House, No. 33 & 35 Partition Street
..... \$6000.

One Thousand Dollars upon Veneer and Ironmongery, Contained in his two story frame House, with a Brick Front, situate No. 33 Partition Street in said City, further described in Surveyors Report No. 116 filed in this office..... \$1000.

For One Year, to expire on the Sixth day of September One thousand Eight hundred and Eleven at Twelve O'Clock at noon."

A policy issued by the Providence Washington Insurance Company on the 23rd of March, 1825, and which policy continued in force until 1836 as shown by an endorsement on the back, enables us to give a copy as an illustration of the renewal receipts which

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continued the policy in force for so many years. The first one issued after the policy was written we reproduce:

RENEWAL RECEIPT, NO. 152

RECEIVED OF Moses Guild and Samuel Guild Nine Dollars being for premium on Two Thousand Dollars, insured by the Providence Washington Insurance Company, by their Policy No. 257 which Policy is hereby continued in force for one year more, viz. from the Twenty Third day of March 1826 at 12 o'clock at noon, until the Twenty Third day of March 1827 at 12 o'clock at noon.

In witness whereof, the Providence Washington Insurance Company have caused these presents to be signed by their President, and attested by their Secretary, in Providence, this 23rd day of March, in the year of our Lord, one thousand eight hundred and twenty six.

Attested—

Rich Jackson President:

Wm. Mathewson Secretary.

This policy contains another interesting feature, and that is an endorsement written in long hand by the President. It reads as follows:

"The assured having made a roof extending over their stone barn and sheds so as to cover both with one roof, it is agreed that this shall not prejudice the insurance.

Rich Jackson President
Dec. 1, 1832"

C. H. Dabney, Secy

The development of clauses, as we now call them, which usually followed on an adverse court decision either to the buyer or seller, is illustrated by the appearance of an embryo mortgagee clause found on the policy of the Shoe and Leather Insurance Company of the 1st of January, 1875. This clause appeared undoubtedly shortly after the decision which took away a large part of the rights which up to that time it had been supposed the mortgagee held. With that adverse court decision there was a great scramble to produce a clause which would be satisfactory and would protect the mortgagee. On the policy above mentioned the clause read: "No alienation of the property shall vitiate the right of the mortgagee to recover any loss under this policy."

One other reference and then we give way to the Standard Policy. There was a company known as the Western Marine and Fire Insurance Company in New Orleans. A policy issued by this company the 7th day of February, 1843, contains the contract and conditions in one document. It is the only one we have ever seen, printed in English and French. This is true of the conditions and also true of the proposals on the reverse side. Of course there was a special reason in New Orleans why the French language should be given almost equal prominence with the English:

After an examination of a hundred or more old policies, extending from the earliest down to the standard policy, one comes to

PRIOR TO THE STANDARD POLICY

the conclusion that many of the good things of the old policies are still to be found in the one document now known as the standard policy. While there had been a tendency to a common form almost from the beginning, yet each company had some slight variation from the others which just prevented uniformity. And it probably would never have been achieved unless the state made the matter compulsory.

II

ORIGIN OF THE STANDARD FIRE INSURANCE POLICY

(Adopted 1886-1887)

ELIJAH R. KENNEDY

The standard policy was needed; therefore it came. It was the result of an evolution out of business conditions that were intolerable. When it appeared it instantly effected a revolution; a revolution that injured no man or no interest, but benefited every one concerned. Its relation to the general business welfare of this State, and of most other States, seems to me to justify the assertion that the statute from which it originated is not second in importance to any enactment of the New York Legislature touching fire insurance.

The substitution of the uniform Standard Policy of New York State for the many conflicting policies,

MARKS AN EPOCH,

and I dare say as important an epoch in the fire insurance business of the country as any event or article since fire insurance began this side of the Atlantic. It wrought not only a great reform in the affairs of companies, but also a beneficent reform, quite as much, in the affairs of property-owners concerned with insurance.

I suspect that most of the active men issuing policies today can not recall the condition of affairs in our business previous to twenty-five years ago, when the Standard Policy was made. They have never had to adjust a loss under a lot of conflicting policies. Previous to 1887 each company prepared its own policy. There were no two exactly alike. The conditions, many of them, were in print so fine that, as Mr. Richards says in his book, "They could only be read by the aid of a magnifying glass." The consequence was that holders of policies were generally unaware of many of the important conditions which affected their business so materially, and thus, after losses, there were many disagreeable surprises, much indignation, and many litigations.

A CHARACTERISTIC INCIDENT

occurred at Batavia, in this State. A building burned; the companies adjusted the loss promptly and fairly, as the owner of the

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building said to me. The proofs were made out, and the companies promptly paid:—all but one, which I may parenthetically remark, is now deservedly dead. That company called the owner's attention to the fact that among the fine print conditions, where the lines were not even numbered, so it was hard to refer to them, there was a provision under which the company did not cover on plate glass above a certain size, unless that was specially indorsed on the policy; and as in this case it had not been specifically endorsed, and as they had learned there was glass in the building above the size permitted, they found that they were wrongfully allotted a charge of fifteen dollars on plate glass, which they deducted from the payment. Now, the other companies, I will say, re-opened their adjustments, although they had paid their losses, and made up that fifteen dollars among them. This incident explains line 43 of the policy. "This company shall not be liable for any greater proportion of the value of plate glass, frescoes, and decorations than that which this policy shall bear to the whole insurance." That was necessary at the time, because it was the purpose of many companies to use this policy in other States, where there would be companies that would not use it, and so they proposed that such companies, with such clauses as saved that fifteen dollars, should not saddle plate glass and fresco amounts all on to companies using the new policy. There are

OTHER CONDITIONS

which require a similar explanation. In lines 96 to 100, for instance, it is provided that a company issuing this policy shall not be liable for more than its proportion of the entire insurance on property removed to a place of safety when endangered by fire.

Companies were in the habit of altering policy conditions to avoid the repetition of unfavorable verdicts in court and unpleasant incidents in adjustments. It was long a question, and I think it still is, whether, under insurance on merchandise in the hands of a commission merchant, that merchant's commissions are covered. You would have thought that in the great Boston fire, where most of the merchandise burned was in the hands of commission merchants, so important a question would have been settled on so great an occasion. Lawyers here gave advice to companies both ways;—that they were liable for commissions and that they were not. The question was not tried out, but was settled, as it has been in all cases I have known in New York since, by compromise. But there was one large company here which subsequently undertook to settle that

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matter, for itself at least; for one day I discovered among those very fine print conditions a few words that had been run in recently, specifically declaring that that company would not pay a commission merchant any sum on account of commissions, in case of fire; that is, under insurance covering merchandise. Now, it was a good deal of bother to correct that condition. It took us some time to get together eighty-five policies covering merchandise in the warehouses and storage stores of commission merchants, but when they were all handed in for cancellation one day, we were requested to give the reason, and the next day we were informed that those fine print words had been erased and a new edition of fine print policies would be issued.

The New York Board of Fire Underwriters recognized the unsoundness of this state of affairs, and long before the State government acted, before any State provided a standard policy, the Board, through a competent committee and with able legal counsel, prepared an excellent form of policy, and many companies represented in the Board began to use it, more especially the New York and British companies domiciled here; but it was not used by all the companies represented here, and not used by companies in other States; and gradually, too, under apparent necessities, amendments crept in and uniformity was destroyed.

I take a little pride in having drawn a bill to require a uniform policy before that which was passed in 1886, which bill was introduced in the Senate by the Honorable Charles H. Russell, of Brooklyn. We had some talk about it, but sentiment had not at that time been sufficiently aroused to warrant the Senator in pressing it, and so, while it was reported to the Senate, no effort was made to order it to a third reading.

THE FIRST STATE TO UNDERTAKE TO REFORM

the situation I have briefly referred to was Massachusetts. There the Legislature made a policy which was embodied in a statute, and with customary jealousy of insurance men the members of the Legislature made that policy without much conference, and much against the remonstrances of many. The natural result of that was that within a year the Massachusetts courts had declared one of the most important conditions in that policy unconstitutional. I think it is still in the policy. The policy was not deemed good enough for adoption by companies elsewhere, except in a very few States where its use was enforced by law. The bill which resulted

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in the standard policy in New York State was introduced in 1886 by Senator McMillan of Buffalo. It was a

RESULT OF DIFFICULTIES

arising out of the adjustment of a loss on the building of the Young Men's Christian Association in that city. When these difficulties had become acute the matter was placed in the hands of Senator McMillan as legal counsel. He was so annoyed and exasperated and baffled by the non-uniformity of the printed conditions in the many policies that he determined then to procure legislation for uniformity. The Board of Underwriters here would have favored any measure that would have provided a uniform policy if the members could have been sure the policy would be a good one. But, warned by the example of Massachusetts, and disturbed by some provisions in Mr. McMillan's bill, the Board instructed its Committee on Laws and Legislation to remonstrate against the passage of the measure. I had the honor to be at the time Chairman of the Committee, and as I was very much in favor of an enforced uniformity of policy conditions I asked to be permitted to resign from the Committee; but the arrangement suggested was that I should not resign, but be excused from service in that matter. So the members of the Committee, other than myself—some of them at least—visited Albany, and attended a public hearing of the Committee on Insurance of the State Senate. At that time the Honorable J. Sloat Fassett was chairman of the committee, the Honorable Commodore Perry Vedder, lately deceased, vice-chairman, and my good friend and neighbor over in Brooklyn, the Honorable Stephen M. Griswold was a member, with whom I had many interesting and profitable conferences.

Right here we encountered an instance of getting your bread back after you had cast it upon the waters, and in a way not contemplated, I suspect, in the Scriptures in this reference. The owner of the building at Batavia which I mentioned turned up as Senator Walker, a member of the Committee on Insurance in the Senate. Not much use to argue with him against a standard and uniform policy. But I am bound to say that he was in all matters temperate and fair in his treatment of the question, except that he would not have the subject of uniformity debated at all—that must be. The argument against the measure was made by Mr. Peter Notman, President of the Niagara Insurance Company, and I suppose at that time as excellent a speaker on business topics to business men as

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any man in the fire insurance business in the world; a man of every quality that was admirable, physical and mental.

I visited Albany as a spectator, and after the hearing, in fifteen minutes, learned that the Committee by a unanimous vote had decided to report the bill favorably. That created

A CRISIS FOR THE UNDERWRITERS

and a special meeting of the Board of Underwriters here was called. It referred the subject to its Committee on Laws and Legislation with full discretion.

I visited Albany at once, and I think that on that trip Mr. Hull, who was Vice-Chairman of the Committee, accompanied me. At various times all the members of the Committee went to Albany, not only to public hearings, but for discussions and conversations with influential members. This was the situation that confronted us—an apparent certainty that the bill would pass. In that case the policy was to be made by the Superintendent of Insurance, who was no more qualified for composing a policy form under which every fire insurance contract in this State should be made than an Egyptian mummy of the Second Dynasty. I intend no disparagement of Mr. Maxwell, as man or politician or Superintendent. We found him a man of good sense and good disposition, and as well aware of his incapacity for making a policy as we were. But there was the bill, and the unanimous report in its favor, and a very determined and strong Senator bound to have the credit of passing it.

Now, I do not positively recollect who it was that first suggested that the New York Board of Fire Underwriters should be substituted for the Superintendent of Insurance to make the policy. I feel quite positive the suggestion originated in the Committee, and I suspect that the Chairman was the only man who had the temerity to propose the alteration.

Some of the Committee were dubious concerning the success of the proposition. Their feeling was, "The State will never delegate such power to a private association." Then Mr. Butler helped us with a precedent. He reminded us that the State had delegated to the New York Chamber of Commerce and the Board of Marine Underwriters of New York the power to elect the commissioners who license all Sandy Hook pilots. Believing in the worth of our proposition, and fortified with the precedent supplied us by Mr. Butler, we returned to Albany once more. I went up to Senator Fassett's house by the park, one evening, and after a long and full

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discussion Senator Fassett was convinced that some alteration was necessary, and he said to me: "Kennedy, if you promise me that you will see that a policy fair to the public shall be made, I will favor your change." So Senator Fassett went down to the Delevan House with me, shortly after dinner, and talked with Senator McMillan. As the bill stood at that time it was so rigid that you could not have added descriptions of property on a policy. The Senator's determination to enforce uniformity was so great that he had overlooked the diversity that must be permitted in certain parts of the policy on account of the diversity of risks and owners. Well, we thrashed it all out until shortly after 11 o'clock, when Senator Fassett said, in terms of personal familiarity not intended for publication, "Well, now, Senator McMillan, I am going home. If Kennedy wants to stay here and fight this matter out with you any longer, he may. I think Kennedy is right and you are wrong, and if you don't become reasonable I will introduce a substitute for your bill, and have it reported, and take all the credit for passing a uniform policy bill myself." So after two o'clock in the morning

SENATOR McMILLAN BECAME TRACTABLE.

I ought to say that the Senator was not hostile. He was a conscientious man. He believed it his duty to force upon the companies a requirement that they use only one policy; he feared our amendments might prevent that. After satisfying him on that point we found it comparatively easy to obtain his consent to the amendment allowing the Board to make the policy. Mr. McMillan has gone the way of all the living. The historical fact remains that it was he who originated and carried through the bill for the Standard Policy.

The bill provided that the Superintendent of Insurance should make a policy, and the amendment read "Unless on or before the fifteenth day of October the New York Board of Fire Underwriters shall make and file with the Secretary of State," a policy.

There were other amendments to permit the flexibility necessary in making individual contracts. Even in those the bill was more rigid than we ourselves felt was necessary. However, it soon passed and became Chapter 488 of the Laws of 1886.

The Board then referred the making of the policy to the same Committee on Laws and Legislation. The members of the Committee who are still living are Mr. J. Montgomery Hare—and I can say that no man on the entire committee did more work, or better

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work, than Mr. Hare; Mr. James A. Alexander, who at the youthful age of eighty-five continues the active pursuit of our business; Mr. Charles A. Hull, and myself, who are still in the business, and Mr. William M. St. John, who has retired. The other members of the committee, Mr. Peter Notman, Mr. Charles Sewall, and Mr. Henry H. Hall, are dead. We chose as additional members for this work, Mr. F. C. Moore, at that time President of the Continental Insurance Company, and who is happily living, and Mr. Daniel A. Heald, at that time President of the Home Insurance Company, who has passed away.

I assure you the members of that committee appreciated

THE GREAT RESPONSIBILITY

that had been placed upon them. From the first we hoped to make a policy that should be so good that it would satisfy not only this State but all the States. We therefore invited co-operation from underwriters everywhere. The Hartford companies chose Mr. D. W. C. Skilton, then President of the Phoenix Insurance Company, to represent them. The Philadelphia Underwriters chose the late Mr. Thomas H. Montgomery, at that time President of the American Fire Insurance Company of that city. We would meet and discuss the policy subjects that came up; Mr. Skilton would go back to Hartford and report to his fellow underwriters in that great center of underwriting brains and capital, and Mr. Montgomery would go back to Philadelphia and confer with his fellow underwriters in that other city of underwriting brains and capital, and then they would return with the result of their conferences and present their views and wisdom.

In those days there was a company at Watertown, N. Y. which was *sui generis*, and in order that its interests should be fairly considered we invited its secretary, Dr. H. M. Stevens, to become a member of our Committee. He accepted and attended many of our meetings, bringing with him the Honorable A. H. Sawyer, an ex-judge of the Supreme Court; and I tell you they gave us many stiff fights. Of the thirteen members of the committee seven are still living. I should add that Judge Sawyer, in matters which were not peculiar to his own company, was of very great service to us in the discussions, especially of legal questions. The Hartford underwriters sent us Franklin Chamberlain, a gentleman eminent especially in insurance law; whose text books in those days were much quoted in court, and much consulted by underwriters,

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and who assisted us very much in the strictly legal questions. The New York members chose as Counsel to the Committee the late William Allen Butler. Mr. Butler, those of us who remember him at that time will easily agree, was recognized as the leading fire insurance lawyer of the United States, besides being very eminent indeed in several other most important branches of practice. His judicial temperament, his perfect familiarity with usages in our business, his broadness of view and freedom from the trammels of petty technicalities, and his serenity amid exciting and occasionally acrimonious discussions, were of inestimable value during the entire period of our labors, and his clarity of style is evident in every line of the policy.

THE MEETINGS OF THE COMMITTEE

were held sometimes up in Mr. Butler's office in the old Trinity Building; oftener in the offices of the Commercial Union Assurance Company, at the familiar corner.

From what we regarded as three of the best policies current at that time we took the conditions on the various subjects in the policies, printed them at the upper corner of large sheets of paper, and sent them to underwriters all over the United States, asking them to improve those conditions, to substitute other conditions, and to write their marks and discussions on the page, and, if requisite, on other pages. When those scores upon scores of replies came in—some of them from as far as California—it fell to the Chairman, who acted as Secretary also, to assort and classify and condense and compare them, and, when they were pertinent, to present them to the committee. I suppose that there never was one-hundredth part of the care and work on any other fire insurance policy in the world—at least, to secure the opinions and judgment of underwriters throughout the nation—that was exhibited in

THE PREPARATION OF THIS POLICY.

At the outset several members of the committee favored dropping the word "insure" altogether, and using the word "indemnify." Many people had come to think that to insure a man a certain amount, or not exceeding a certain amount, meant that the company, in case of fire, was to pay that amount; and so it was urged that "will indemnify for loss by fire" should be substituted. The majority of the committee, however, adhered to the old term.

The next matter was to endeavor to confine the risk to the

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place described in the policy. Out in the city where I was reared a lady whose furs were supposed to be insured in her private dwelling had sent them down for repair to an extremely hazardous risk in the business part of the city, and when the factory burned she found a lawyer able to convince the jurors and the court that the insurance followed the furs; that it was a natural and necessary use of the furs that they should be sent out for repairs occasionally. I suppose that lady had the idea that her furs were also insured when she wore them to the theatre. Such a construction would convert every household furniture policy into a floater at private dwelling rates. Well, we endeavored at least to locate the companies' risk by using the words "*While* located therein, and not elsewhere," and since then, I think, the decisions have been favorable to the view that the risk is confined to the place which the company takes a premium for. There were those who favored

A BRIEF POLICY.

Doubtless all that is essential could be compressed into half the words in this policy and the policy would then be understood by officers of companies and adjusters, but not by the general public. The Committee felt that the policyholders should have the conditions before them in language so plain that it could be understood without necessity for consulting a lawyer or undertaking to learn what the latest adjudications were. And when the policy appeared many thought it was too long, judging from its size and appearance. That is partly due to the fact that the type was much larger and more open than most of the type in the policy conditions that people were accustomed to. There are 2,536 words on the face of the New York standard policy, exclusive of forms and strictly company verbiage, which is quite one thousand words shorter than the policies that were formerly used by many of the great companies doing business in the United States.

Now, we realized as a Committee that we and the Board to which we must report were substituted for the Legislature of this State in making a standard policy, and that we must make it as fair and liberal toward the people of this State as a reasonable and fair-minded legislative committee or commission would do. But I can illustrate

THE SPIRIT WHICH GOVERNED THE COMMITTEE.

I may remind you that up to that time any company could cancel its

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policy at any moment. There are exceptional cases, such as when a moral hazard has been discovered, where it seems fair to allow a company to cancel forthwith; but the Committee felt it would be unfair to perpetuate against everybody this privilege simply because companies might wish to exercise it in one case in ten thousand. Therefore they provided that the companies might cancel only after five days' notice. Such protection of the interests of the insured had never been in any policy in New York State or any other State, except one.

Another condition in the interest of property owners: All policies contained a clause making it the duty of the insured to move property endangered by fire. In the New York standard policy that condition continues, and is expressed in lines 32, 33, and 34. But the Committee felt that if a man moved his goods at the behest of the insurance companies it ought not to be left to a court and jury to say whether the insurance continued to protect him in the place where he moved his goods; and so we framed an equitable rule, which you will find beginning at line 60, by which it is made clear that the insurance follows the goods when they are removed out of danger of fire in the vicinity. This is the first policy, I think, that ever contained this stipulation.

Another provision solely for the benefit of the public: Every policy contained a more or less stringent clause forbidding alterations or repairs without a special permit endorsed on the policy, for which, generally, a charge was made. I suspect that under a strict construction of this clause most policies were invalidated every year.

Line 15 and the context provides a reasonable and generous mechanic's privilege without charge and without the trouble of handing in the policy for endorsement.

Previous to this many policies stipulated that a mortgage on real estate invalidated the policy unless the consent of the company was obtained. The Committee struck that out altogether, but only after strenuous efforts of one member to retain the old provision. The Connecticut companies were especially interested to have it struck out, as there had been a suit in Connecticut against one company which undertook to plead the invalidation of its policy because of a mortgage on a farmhouse in Connecticut, which had been destroyed by fire; and when the gentleman from that one company was arguing the matter before the Committee Mr. Skilton reminded

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him that the Connecticut companies offered to pay his loss for him, if he would let them, in order to avoid the scandal a lawsuit would create and the hostility certain to be excited in the Legislature.

The topic assigned me does not call for the discussion of

THE CONDITIONS OF THE POLICY.

That is unnecessary, for our friend Mr. Richards has lucidly explained them in his book, although some few of his conclusions, like court decisions, leave room for contention. But the historical account would be incomplete if I neglected to tell how some features originated, features dissimilar to those in policies that were displaced by the one I am describing.

First, we adopted the word "insured" instead of the word "assured." And since there is not, perhaps, more than one, and perhaps not even one, American company called a fire assurance company, I regret that the Insurance Exchange has in all its circulars and promulgations used the old and obsolete term of "assured." It is not too late for the Exchange to follow the statute and the standard policy under which all the contracts are made.

Then, in the line numbered 1,—the first line reads: "This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs."

Here is a fair notice to people who had an idea, such as the valued-policy folly promulgates, that the value of the property is the amount of the insurance policy. This was put in to correct that misconception.

There are other words, later on in the same clause, referring to the right of the company to substitute articles of "like kind and quality."

Everything was done to tell a property owner plainly that he was insured simply for the actual damage he might suffer by fire, and that the companies on making him good would discharge their full obligation. Mr. Heald expressed himself as considering the option in line 5, "to replace damaged property with other of like kind and quality," the most important right that was preserved to the companies in the entire policy.

In all the printed lines from No. 1 to No. 112 there is no topical caption or heading. Many of the best policies previous to this had topical headings, but Mr. Butler cautioned us regarding the danger of that, lest some one condition that belonged under a heading might appear somewhere else and the insured thus be able to

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claim that we had misled him. So we left headings out, but numbered the lines to make them easy of reference.

Previous to this, conditions respecting important features of the contract had been scattered throughout the policies. The provisions relative to proceedings after a loss appeared in five places in one of the best policies that we had before us, and indeed appeared in as many places in this policy when the stipulations on that subject were first formulated. The Chairman was therefore authorized and directed to assemble all clauses relative to certain subjects by themselves. And so they are arranged in order, and the provisions relative to proceedings after a loss appear in lines 60 to 107.

Here, again, the purpose of the Committee was to set plainly before the policyholders their rights and also, as well, their duties after a fire. Experienced adjusters for companies do not need these rules and conditions set forth in this place, but a property owner who had suffered from a fire, we felt, had a right to expect that these details of the contract should be expressed in the contract, so that he need not have to go and consult a lawyer about the common law.

THE SELECTION OF AN UMPIRE

in appraisals, before this, often set the insured and the companies at loggerheads. The insured, for instance, selected his appraiser, who was satisfactory to the companies, and the companies selected their appraiser, who was satisfactory to the insured. And then one set of companies said, "No, we cannot choose an umpire, except in the event of disagreement by the appraisers. That is in *our* policies." Another set of policies required the selection of the umpire at the outset. So what they call in France an *impasse* occurred. Which side was to waive the conditions of their policies—both sides being forbidden by the terms of their policies to waive anything? We thought it over and decided that it would be better to agree on an umpire before the appraisal began; for wrangles between appraisers sometimes excited such antipathy that the two found it impossible to choose a third—the umpire. We provided against that by the stipulation beginning at line 86.

The statement of the acts and conditions that would void a policy formerly appeared in several places. Here they are all in one place, and that prominent among the first short lines, so that no policyholder could be excused for overlooking it. Such void-

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able conditions as cannot be waived or consented to by the company are clearly mentioned in lines 7 to 10. Those that may be waived or consented to follow in lines 11 to 30.

There are other stipulations comprised in the printed lines solely for the information and understanding of policyholders

There are also provisions designed as safeguards against excess of hostile construction by courts. At line 73 it is provided that the prohibition of other insurance (unless consented to by the company) applies to such other insurance, whether it be valid or not. The stipulation prevents a man from claiming that he had no other insurance if he had done some act to invalidate it.

The expression "whether valid or not" was intended to cover, also, a case in Iowa. A man who had a loss presented his policies, we will say, to five companies. One was found to be insolvent. The man said, "Well, then, you four must divide the loss between you." The four companies said "No, you have been carrying this insurance. That you have paid for. It is not our fault, and we do not propose to pay that company's loss." So they went to court, and the Iowa court decided that the four companies must pay, thus virtually making solvent companies guarantors of the solvency of their co-insurers. So the companies felt it was quite proper that a clause should be inserted in our insurance policy by which the owner, and not the solvent company, should take the consequences of his buying "cheap and nasty" insurance.

At line 36, the provision as to fallen buildings reads: "If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease." We knew, of course, that this meant any *important* part of a building. That was rendered necessary by a case in Louisville, Kentucky, where a considerable part of a wholesale warehouse fell, and fire ensued, completing the destruction of the contents; but because the policy conditions read "if a building fall," and because the *whole* building did not fall, the court held the policy had not been invalidated, and the companies had to pay. Most or all policies used to contain a declaration that

THE BROKER WAS AGENT OF THE INSURED.

Now we felt that was unjust. That was a question of fact, and sometimes of law, in each case. Sometimes the agent of the company becomes also the agent of the insured, and *vice versa*. This policy avoids the folly of attempting to settle that question in ad-

ORIGIN OF THE STANDARD POLICY

vance, but by the same rule of reason it undertakes to prevent having agents appointed for the company or foisted upon it without its consent. You will find the stipulation at line 47; "In any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of this company."

We refrained from any declaration as to who shall be deemed the agent of the insured.

One of the leading adjusters of the present time came to me a few weeks ago and said he was about to deliver an address on the standard policy. He had adjusted a great many losses under it and thought he understood its conditions—which was not remarkable, since he is a man of at least average intelligence, and I think the conditions are clearly expressed. But there was one thing in the policy that he could not understand, and had never found any one who could explain it to him. He called my attention to the latter part of line 100, which reads: "Liability for reinsurance shall be as specifically agreed hereon."

WHAT DOES THAT MEAN?"

To understand that one must be familiar with the statute creating this policy, and with all the circumstances. Mr. McMillan, as you know, was determined to secure uniformity in fire insurance contracts in this state. Even after we had secured his consent to amendments that allowed the companies to write in descriptions of property and a few indispensable facts and conditions applicable to specific risks, the bill forbade any clause "inconsistent with or a waiver of" any condition of the standard policy and prohibited "any other or different" rider or condition. Fire reinsurance is substantially fire insurance and is regulated by the same laws, but reinsurance varies enough from direct insurance to require a contract different in some respects from a contract with a property owner. Such a difference might under a strict construction of the statute, be regarded as prohibited. So, to recognize reinsurance and enable it to be carried on under Senator McMillan's law, and in accordance with the conditions of the standard policy with such adaptations as were requisite, this stipulation at line 100 was incorporated in the document.

A similar explanation will account for the provision beginning at line 56 and another provision beginning at line 110. The law said: "No other or different provision, agreement, condition or clause shall in any manner be made a part of said contract or be

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endorsed thereon *or delivered therewith.*" Under this restriction even a mortgagee clause could not have been used, so the provision beginning at line 56 was inserted. Then the provision beginning at line 110 was inserted to accommodate mutual companies, of which at that time there were several who would have been much hampered in their natural operations without some such stipulation.

I repeat that it was hard work to persuade Senator McMillan of the necessity of some of the amendments we proposed to his bill, but at last he came to see the propriety of an amendment by which "forms of description and specification, or any schedules of the property covered by any particular policy, and any other matter necessary to clearly express all the facts and conditions of insurance on any particular risk (which facts and conditions shall in no case be inconsistent with or a waiver of any of the provisions or conditions of the standard policy herein provided for) may be written upon, or attached or appended to, any policy issued on property in this State."

Another amendment upon which we agreed was that "provisions required by law to be stated in this policy" might be added thereon or attached thereto. This, I recollect, was intended for the convenience of the companies that print the safety fund conditions on their policies, and I do not remember any other explanation.

SIX MONTHS' LABOR.

Well, we worked over this matter assiduously for six months. Many of us gave up much of our summer holidays. I will say that I never served on a committee of any business or social organization where the members were more faithful, more punctual, and more conscientious, and I trust I may add more intelligent, in the performance of their tasks. And I shall do my own feelings violence if I fail to mention our very prompt and efficient printer, Mr. L. W. Lawrence, and his foreman, a man whom I knew only as Billy.

These numbered lines, during the deliberations of the policy, extended all the way across a sheet of the size of a policy, with ample space between for notes—like legislative bills, except for the size of the paper, and I suppose that during the deliberations we had at least 50 prints made, as conditions were altered, introduced, or eliminated. Then, when we were through and the policy was ready, Mr. Butler drew our attention to a provision of the statute that called not only for a policy, but, and now I use the language

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of the statute, also "Such provisions, agreements or conditions as may be indorsed thereon or added thereto."

And he advised us that to neglect to perform this duty would work for forfeiture of our right to make and file the policy. So we started in again and labored for another month. We made a co-insurance clause and a percentage co-insurance clause and a lightning clause and a mortgage clause—in all twenty-two clauses. Finally that was done and we reported to the Board. There was a strong effort in the Board to force

THE CO-INSURANCE CLAUSE

into the printed conditions, and we opposed that. We reminded the members that for the task of supplying a policy for the people of this State the Board had been substituted for the Legislature; that the Legislature had the right to assume that the people would not get from us any innovations or conditions that were uncommon and unfamiliar; that while nobody could object to new conditions more liberal to policyholders than had ever been placed in a policy, we were expected to codify and carefully express the conditions to which the people of the State had become accustomed; and to put in a new condition which was revolutionary would be an unwarrantable exercise of the authority the State had vested in the Board and would discredit us all. There was much earnest and sincere debate on both sides, but at last the policy and all the twenty-two clauses were adopted without the slightest change. We realized we were not to make a new policy, especially, but a policy that should produce uniformity throughout the State.

The statute required that all policies should conform to the standard as to size, type, and blanks. As one legal adviser at that time said; "Every policy must be a Chinese copy of the standard."

We never contemplated so great a sheet of paper as the present policy. We never expected that these numbered lines should be hastily run together in one place. There is a great deal of blank paper here where some of them might as well go, and we expected to take this policy to our excellent printer and also some other printer of renown for taste and ask him to compose a policy in which the type should be large and legible but in which the form and shape should be more convenient for use. By permission of the legislature that might even now be done. But we had expended so much time—especially on those twenty-two riders—that we had no more time to obtain the typographical arrangement we desired.

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We assembled at Mr. Butler's office for our last meeting. Members had felt the strain of the prolonged labors; there had been some displays of impatience. Now, however, there was the best of feeling between us all, and we received Mr. Butler's benediction. It was a tribute to the fidelity, the zeal, the conscientiousness of the members, and we felt that it was much like "approbation from Sir Hubert Stanley." I think we all felt we deserved some praise. We had completed a great work, and we had put into it the best of which we were capable.

I shall risk your good opinion—it is the business of insurance men to take risks—when I say that I shall always remember with the deepest satisfaction how our venerated mentor looked in my eye, and said: "I do not know another man who could have carried this through."

It was late in the day preceding that on which the papers must be filed with the Secretary of State in Albany or the right of the Board to file them would lapse. We were unwilling to trust to the mail, so Mr. Hull sent a special agent of the Howard Insurance Company to Albany, and the Standard Policy was launched.

I have now the first copy of the standard policy that was ever printed. I saw it come off the press and took it at that time. It contains the autographs of the members of the committee and our three legal advisers. Every member of the Committee received a copy thus signed.

Mr. Butler once told me—jestingly—that his summer's work for our Committee was, from a business point of view, the worst thing he had ever done, for the standard policy had nearly put a stop to litigation arising from policy conditions. Of course, it was beyond the power of the New York Board to eradicate litigiousness altogether from human nature,—the legislature hadn't given us the authority—and there have been a few suits; but so far as I know there have been only two subjects concerning which the New York courts have interpreted provisions of this policy contrary to the purpose and understanding of the Committee and the Board. One was in construing the cancellation clause, which begins at line 51. That received as thorough consideration as any stipulation in the entire policy. European policies are generally not subject to cancellation at all. The practice in America differed, and we felt that we must continue the American practice. A man ought to be able to get rid of his policy, or the company get rid of a disagreeable customer, as easily, at least, as a man can get rid of his wife when

ORIGIN OF THE STANDARD POLICY

they become tired of each other. If property owners are able to cancel at any time there is no hardship to the company in that. Policies had always preserved the same right to the companies. There are several good reasons why companies should be able to cancel. The Committee never questioned the equity or the wisdom of continuing the practice, but, as already stated, we determined to give the insured five days' notice.

HOW GIVE NOTICE?

It was proposed that it should be done—here is the language of one of the clauses suggested: "By registered letter or otherwise," Mr. Butler thought that a poor provision. How prove that a registered letter had been delivered? One member of the Committee pulled out his scrap book and displayed three receipts for notices that had been sent by registered letters to one man. "Do you mean to tell me," exclaimed the committeeman, "that those three policies are not cancelled?" Mr. Butler, like a thorough lawyer, said, "Let me take the book." Then he added, "Each of the three notices is signed in the name of the insured, but they are all in different hand writings." The member of the committee collapsed and the registered letter provision was stricken out. We concluded to require the company to give its notice in any way convenient or practicable, leaving the burden on the company of proving that it had actually given notice. Then came

THE QUESTION OF RETURN PREMIUM.

The principle that had governed was that if you take a man's insurance away from him, you must put him back in as good position as he was in before he paid you for it. You must return or tender him the unearned part of his premium. The committee recognized the equity of that principle, but we were very desirous that the company should be relieved of the necessity of actually paying without getting a receipt or any acknowledgement. In cases of moral hazard—the very cases that troubled the companies—the insured would decline to receive the return premium and deny on oath that it ever had been tendered to him. So the committee determined that, while the companies should restore to the insured what he was entitled to, the companies should have something to show for it. I think Judge Sawyer drew up the first clause. The clause proposed received very thorough discussion. Finally, Mr. Skilton took it to Hartford. Mr. Chamberlain and Mr. Skilton, after a week's delib-

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eration in Hartford, came back to another meeting of the Committee. I remember very well how Mr. Chamberlain presented the new form of the clause to the committee. Judge Sawyer looked it over and smilingly approved it. Then it was passed around to all present, and at last Mr. Butler examined it very thoroughly, altered a word, and said, "I think that will do," and that is just as it stands in the policy now, beginning at line 51.

Under this method the business went on for many years. Then a talented young lawyer was able to persuade the Court of Appeals of this State, in the case of Tisdell versus the New Hampshire Fire Insurance Company, 155th New York, page 163, that this clause did not mean what it says, and that when a company wishes to cancel, the return premium must be paid or tendered without the insured's complying with the stipulation that he must return the policy. The honorable judge who wrote the opinion for the majority of the court based his conclusion on a decision of the same court on an earlier policy and a different provision. Now I could not speak disrespectfully of the Justice who made that decision, because I have a profound respect and admiration for him; but when the same question came up in the United States Circuit Court here, in the case of Swarczchild & Sulzberger versus the Phoenix Insurance Company of Hartford, the learned judge decided the other way. (145 Federal Reporter, 653.) The syllabus reads: "It is not essential to the effectiveness of cancellation by the insurer that the unearned premium be returned or tendered before the surrender of the policy," and in rendering his decision Judge Wallace used this language: "The decision of the Court of Appeals of New York holding the contrary in respect to a similar condition is entitled to great consideration, but it is not controlling upon this court; and the view of the minority of the court, expressed in the dissenting opinion, commends itself to me as presenting the better reasoning." In the United States Court of Appeals (124 Federal Reporter, 52), Judge Wallace's decision was affirmed. The three judges refer to the State Court of Appeals decision in

DEFERENTIAL TERMS OF DISRESPECT.

And concerning this clause in the policy they say: "It is difficult to conceive how language more definite could have been employed to show that the right to claim such unearned premium could only occur after cancellation by the insurer and surrender of the policy by the insured."

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This ought to be some time again submitted to the State Court of Appeals.

The other matter in which the courts have held contrary to the purpose and understanding of the Committee and of all underwriters is in the case of Denley versus Glens Falls Insurance Company (184 New York, 107). Line 7 and line 11 read, "This entire policy, unless otherwise provided, etc., shall be void" in certain cases clearly set forth. There were several items in the policy, and it was, as to one item, unquestionable that the insured had voided something—the "entire policy," the Glens Falls people thought, but the court held, as the syllabus expresses it, that "Breach of warranty as to one subject of insurance does not affect the policy as to the other subjects."

I cannot feel that the policy is to blame for a state of mind that could produce such a decision. Still, able and unbiased expounders of this policy appear to have been unaware of the business considerations that led to the adoption of this clause in this form.

The companies at once began issuing the New York standard policy everywhere. Soon other States passed enactments forbidding the use of any other form. Michigan was the next State to establish a standard, after New York. That policy was prepared by a commission consisting of the Superintendent of Insurance, one lawyer, and one Detroit merchant, and when they had their policy completed it was precisely the New York policy, with two slight verbal changes and one change of condition. It was hoped before the policy went into force, since they had so nearly followed the New York model, that they might be persuaded to adopt it altogether. So the Western Union committee came on from Chicago to Detroit and, obedient to a request from the committee of the National Board, I went there to meet them. The State Commission gave us a very courteous, considerate, and patient hearing, and the Superintendent of Insurance, who was an open-minded and fair man, said, after the hearing, "If we had known the enormous pains taken to make that New York policy, and had heard your explanation of the one clause in which we have differed, I feel sure there would have been no time spent in working up this matter at all, but we would have adopted your policy." They found, however, that a good many companies had printed the new policies as made by the commission, and they felt it would be unfair then to adopt a policy that would require them to print another supply. The Phoenix of Hartford was one of those companies. I telegraphed to our fellow

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member, Mr. Skilton, who sits here, and he telegraphed back: "The Phoenix would much rather destroy its policies than have a variation from the New York form." But it was too late.

The National Board at its next meeting passed a resolution thanking *its Committee* on Laws and Legislation for the effort!

Superintendent Hendricks, some years later, secured the passage of a bill authorizing the New York Board to make additional clauses for riders, which the developments of time had shown were required, and at the last session Superintendent Hotchkiss, who has greatly honored me by coming to hear this long talk, induced the Legislature to authorize a form of blank for use on the typewriter—which has taken the place, in so many offices, of pencils and pens. That was a very sensible and businesslike provision. There is, however, after the twenty-five years which we celebrate this fall, no change in the contract.

I look back with profound satisfaction that I was privileged to serve in this important matter, and no doubt the other members of the committee have the same feeling as to their own share in the work. I rejoice that I have lived the quarter of a century since, and that you have given me this opportunity of narrating the history of the origin of the Standard Fire Insurance Policy of New York State.

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- (1) *Seaman v. Fonerneau*, 3 Strange 1183.
- (2) *Burgess v. Equitable Mar. Ins. Co.*, 126 Mass. 70.
- (3) *Walker v. Maitland*, (1821) 5 Barnewall & Alderson, 171.
- (4) *Dehahn v. Hartley*, (1786) 1 T. R. 343.
- (5) *Jeffery v. Legender*, (1691) 3 Lev. 320.
- (6) *Gaines v. Fidelity & Cas. Co.*, 188 N. Y. 411.
- (7) *Capital Fire Ins. Co. v. King*, 82 Ark. 400.
- (8) *Westchester F. Ins. Co. v. Ocean View Pleasure Pier Co.*, 106 Va. 633.
- (9) *In re Bradley, etc., Accident Indem. Soc.*, (1912) 1 K. B. 415.
- (10) *Burleigh v. Gebhard Fire Ins. Co.*, 90 N. Y. 220.
- (11) *Bean v. Stupart*, 1 Dougl. 11.
- (12) *Owen v. Metropolitan Life Ins. Co.*, 74 N. J. L. 770.

III

THE NEW STANDARD FIRE INSURANCE POLICY OF THE STATE OF NEW YORK

(Adopted January 1, 1918)

DAVID RUMSEY

*Attorney; Formerly Vice-President and General Counsel, Continental
Insurance Company, and of the Committee which Drew
Up the New Policy*

The fire insurance policy is probably the most important contract in the world, and the New York standard form is a document upon which the safety of practically all property values in this country is dependent. While there are other forms of fire policies in use in the United States, the New York standard is the legalized contract in twenty-six states and serves as the foundation for establishing, and the guide for modification of fire insurance contracts in use throughout the rest of the country. The New York standard form was established by law in 1886. It was created at the insistence of the Legislature, but was prepared by the Committee on Laws and Legislation of the New York Board of Fire Underwriters. The interesting history of its origin by Mr. Kennedy, one of the members of the Committee which drafted the original New York standard policy, was presented to this society in an address delivered in November, 1911. I think it would be impossible to praise too highly the work done in the preparation of the original New York standard form. The difficulty of formulating a single contract to be applicable to the vast number of varying conditions of property insurance can scarcely be overestimated. The successful accomplishment of a most difficult purpose is indicated by the fact that the New York standard fire policy was continued in use without change for thirty-two years, and during that time comparatively few of its provisions have been nullified by the courts or disregarded as obsolete.

The original New York standard form was a liberal document, judged by the standards of the time in which it was prepared. The fact remains, however, that with the passage of time—with the broadening and uplifting of business standards and the increased public impatience with technicalities, the old con-

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tract became, in many respects, archaic and illiberal. It was prepared in an age which antedated the agitation against capital and trusts. The representatives of insurance companies were jealous of their right to impose their views upon the insurance business. They intended to be just to their customers but they also intended that in case of doubt, the companies' interests should not be imperiled and this solicitude for the companies' interests resulted in certain provisions of the policy contract which, tested by modern standards, are, in certain cases unfair and in other cases unworkable.

The determination to revise the New York standard policy took official form in the year 1913 when the New York Legislature adopted a joint resolution directing the Superintendent of Insurance to submit to the National Convention of Insurance Commissioners a request for the appointment of a committee to investigate the necessity for changes and to recommend to the Legislature such changes as, in the opinion of the Committee, might be necessary. The Committee of Insurance Commissioners was composed of Mr. Emmet of New York, Mr. Young of North Carolina, Mr. Johnson of Pennsylvania, Mr. Mansfield of Connecticut and Mr. Ekern of Wisconsin. They requested the cooperation in their work of Mr. Shallcross, now of the North British & Mercantile Insurance Company, and myself acting for The Continental Insurance Company. As the work progressed it was done, not only in conference with the Insurance Commissioners Committee, but with the Committee on Laws and Legislation of the National Board of Fire Underwriters and with a number of more specialized committees, such as informal conferences of agents, brokers and adjusters, and the work continued intermittently for about four years before the new standard form was completed and enacted into law in the year 1917, the new policy to take effect January 1, 1918.

The new policy contains upon its first page what may be termed the contract of insurance reduced to its simplest form, relegating all of what may be regarded as the incidental provisions to the second page. These become incorporated into the contract by reference thereto in the main contract.

The contract, stripped of all qualifying clauses, may be defined as follows:

The company agrees to insure, or, in other words, to indem-

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nify against loss or damage by fire to the extent of the value of the property.

This broad undertaking is subject to three vital limitations, namely, that the liability of the company shall not exceed either—

- (1) The value of the property, or
- (2) The replacement or repair cost, or
- (3) The amount of the insurance named in the policy.

The value of the property, as used in the contract, is more precisely defined as meaning the "actual cash" value "at the time of loss or damage." Thus, the idea of speculative or future value is eliminated and the idea of any fictitious valuation founded upon the relation of the owner to the property is negatived. In ascertaining value, "proper deductions for depreciation" must be made.

The cost of repair or replacement, which is referred to in the policy, is subject to three qualifications:

- (1) The replacement is to be with material of like kind and quality;
- (2) Its cost is to be estimated on the basis of a reasonable time to make the repair or replacement.
- (3) In estimating the cost of replacement, no allowance shall be made by reason of the fact that ordinances or laws require reconstruction or repair in a manner or with material more expensive than that which was destroyed.

Neither value nor replacement cost shall include compensation for loss resulting from interruption of business or manufacture.

A contract of insurance is a contract of indemnity. This has been established by a uniform line of judicial decisions founded upon sound reasoning. It is only as insurance effects indemnity that it can be economically justified and freed from the objections which would attach to gambling contracts which are against the public policy and void. It was with this view that many of those who were concerned with the drafting of the new form proposed to substitute for the words "does insure" the words "does hereby agree to indemnify," but the proposed change of phraseology was considered to be unnecessary in view of the many decisions to the effect that the word "insure" is practically synonymous with the word "indemnify." This idea of indemnity and indemnity only is, however, expressive of the guiding principle of a valid insurance contract. It explains all of the limitations upon the company's liability and the qualifi-

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cations of the phrases used as set forth in the main contract of the new form. It shows that the purpose of the contract is to restore the insured to the position in which he was prior to the loss up to the limit of the indemnity which he has paid for (namely, the amount of the insurance) but that the values which shall be restored are only actual or commercial values, and that a proper limit of indemnity restricts insurance to cost of replacement of the thing destroyed as nearly as possible in the condition in which it was at the time of the loss.

The first page of the new form, viewed as a whole, is a contract of indemnity, and many perplexing questions will be solved wisely in the future, as they have been in the past, by bearing in mind that such is the meaning and the only legitimate scope of a policy of fire insurance.

The new form runs to the insured "and legal representatives." This is a substitute for the following language in the old form: "Wherever in this policy the word 'insured' occurs, it shall be held to include the legal representative of the insured."

The new form defines the insurance as covering "to the extent of the actual cash value (ascertained with proper deductions for depreciation) of the property at the time of loss or damage." This is a substitute for the following language of the old form:

This Company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused.—(Lines 1 and 2.)

Thus the undertaking of the company becomes expressed in the affirmative instead of in the negative as formerly. The construction of the old policy and the new should be the same, for under the old policy the obligation of the company was held to extend to the value of the property, subject to the other limitations of the contract, although it was based altogether upon the judicial interpretation of the word "insure."

The new form limits the insurance as follows: "But not exceeding the amount which it would cost to repair or replace the same with material of like kind and quality within a reasonable time after such loss or damage, without allowance for any increased cost of repair or reconstruction by reason of any ordinance or law regulating construction or repair." This is an adaptation of the following in the old form:

and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; in line 2 and also the following:

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nor, beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings; in lines 41 and 42.

As a matter of form, the clause which was at lines 41 and 42 should follow the clause which it qualifies instead of being forty lines removed from it.

As a matter of substance, the omission of the words "the insured" in old line number 2 renders it unnecessary in the future to consider the relation of the insured to the cost of repair or replacement. Hereafter the subject will be treated upon an absolute rather than a relative basis. If the insured is in such a position as to be able to repair or replace at less than market cost, that circumstance would not necessarily be available to the company to decrease its liability in so far as it may be measured by the replacement cost and, on the other hand, if for any reason it is peculiarly difficult for the insured to replace and, consequently, the cost of replacement would be greater than market cost if done by the assured, that circumstance cannot be used against the company's interests. Cost of repair or replacement should be treated on the basis of general market conditions rather than in its relation to any particular party, and it was with this view that the change from the old form was made.

Again, the change by striking out the word "then" and adding in the new form the phrase "within a reasonable time after such loss or damage" is in line with a rational and fair treatment of this subject instead of a technical one. As a result of this change, there should be no room for argument that the replacement cost which is referred to involves immediate action and the increased expense thereof instead of a reasonable time allowance in view of the situation and the character of the work of replacement.

The elimination of the words "of buildings" as formerly in line 42 was not intended as a change of substance, but was done merely because the words added nothing to the meaning of the sentence.

The insurance is further limited by the new form as follows: and without compensation for loss resulting from interruption of business or manufacture. The corresponding provision of the old policy was found in the paragraph at lines 38 to 44:

This Company shall not be liable for loss to.....or by interruption of business, manufacturing processes, or otherwise.—(Line 42.)

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The change is not one of substance but of form. As neither computations of the value of destroyed or damaged property nor estimates of its replacement cost are to be increased by loss from interruption of business or manufacture, it is important to the policyholder to be informed of this by an expression of the limitation as a qualifying clause immediately connected with the statement of the company's principal undertaking. If the indirect loss due to interruption of business or manufacture is to be insured it should be covered by use and occupancy or profits insurance.

The new form provides for insurance not only by fire but "by removal from premises endangered by fire." This provision is new. The provision in the old form was restricted to a qualified continuance of the insurance against fire loss in a new location, but provided for no liability for loss or damage incident to the removal (Old form lines 60 to 66). Some courts have held that loss or damage incurred in the process of removal made necessary by danger of fire, are proximately caused by the fire and therefore the insurer is liable. While this is open to question as a legal proposition, a sound public policy and the interest both of the insured and the insurers require that the company should assume such liability. Hereafter the obligation will depend upon a clear provision in the contract and uniform treatment of the subject will be required.

The new form refers to the property covered in the following language:

to the following described property while located and contained as described herein, (or pro rata for five days at each proper place to which any of the property shall necessarily be removed for preservation from fire), but not elsewhere, to-wit:

In the old form this clause read as follows:

to the following described property while located and contained as described herein and not elsewhere, to-wit:

All of this language is retained but between the word "herein" and the word "and" is inserted a clause in parenthesis continuing the insurance for five days at a place to which property is necessarily removed to preserve it from fire. The corresponding provision of the old policy was as follows:

If property covered by this policy is so endangered by fire as to require removal to a place of safety, and is so removed, that part of this policy in excess of its proportion of any loss and of the value of property, remaining in the original location, shall for the ensuing five days only, cover the property so removed in the new location; if removed to more than one location, such excess of this policy shall cover therein for such five days in the proportion that the value in any one such new location

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bears to the value in all such new locations; but this company shall not, in any case of removal, whether to one or more locations, be liable beyond the proportion that the amount hereby insured shall bear to the total insurance on the whole property at the time of fire, whether the same cover in new location or not.—(Lines 60-66.)

This provision of the old form was in terms flatly contradictory to the clause limiting the risk to the described location. It was more elaborate than the importance of the five-day risk warranted and it was ambiguous. The necessity for the elaboration was only because, by the old form, property removed as a precaution thereupon became outside the scope of the policy and had to be brought back under the terms of the policy for the five-day period by means of a clause which defined its participation in the insurance with the property not so removed. The effect of qualifying the general limitation as to location by the words in parenthesis, is to leave the removed property within the description of property insured, for five days after removal, and the words *pro rata*, which now have a recognized meaning in insurance terminology, define the extent of participation in the insurance, by property removed to one or more places, precisely the same as if the entire clause of the old policy were used.

The new policy reads:

1 **Fraud, misrep-** This entire policy shall be void if the insured
2 **sentation, etc.** has concealed or misrepresented any ma-
3 **terial fact or circumstance concerning this**
4 **insurance or the subject thereof; or in case of any fraud or false**
5 **swearing by the insured touching any matter relating to this**
6 **insurance or the subject thereof, whether before or after a loss.**

The old form read as follows:

This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.—(Lines 7-10.)

The omitted words "in writing or otherwise" added nothing. In the absence of expressed restriction upon the kind of concealment or misrepresentation intended, it is manifestly impossible to limit their meaning by implication, so as to require an additional phrase for the purpose of extending the meaning which results from the simple use of the words, without qualification. It was thought that the omitted words, "or if the interest of the insured in the property be not truly stated herein," have sometimes worked injustice upon the insured, without being necessary for the protection of the company against dishonesty. The statement of the interest of the insured, as set forth in the policy, may

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be made by the company or its agent, not by the insured. If the statement is erroneous by reason of concealment or misrepresentation by the insured, the policy becomes void by the operation of the clause at lines 1 to 6 referring to fraud and misrepresentation. But in the absence of fraud, the insurance should not be invalidated through any error of expression made by the company's agent but not induced by the wrongdoing of the insured.

The new policy contains a clause similar to the old form as to property which is not, and cannot be insured (new policy lines 7-9, old policy line 38). But the provision as to property excepted from the coverage now provides that the policy shall not cover

9
10 named hereon in writing, bullion, nor, unless specifically
11 scripts, mechanical drawings, dies or patterns.

The old form provided as follows:

nor, unless liability is specifically assumed hereon, for loss to awnings, bullion, casts, curiosities, drawings, dies, implements, jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture tools, or property held on storage or for repairs.—(Lines 39-41.)

Thus under the new form unless so stated in the policy the company is not liable for loss "to bullion, manuscripts, mechanical drawings, dies or patterns" even though such property be within the general description of the property insured as shown by the description upon the first page of the policy. But all of the other kinds of property which by the old form could be covered only by rider now are within the general coverage of the policy if they are fairly within the general description of the property insured although not specifically mentioned.

The clause as to hazards which are not covered is the same as in the old policy (new policy, lines 12-19, old policy, lines 31-34).

The new policy reads as follows:

20 This entire policy shall be void, unless otherwise provided
21 by agreement in writing added hereto,
22 **Ownership, etc.** (a) if the interest of the insured be other than
23 unconditional and sole ownership; or (b) if
24 the subject of insurance be a building on ground not owned by
25 the insured in fee simple; or (c) if, with the knowledge of the
26 insured, foreclosure proceedings be commenced or notice given
27 of sale of any property insured hereunder by reason of any mort-
28 gage or trust deed; or (d) if any change, other than by the death
29 of an insured, take place in the interest, title or possession of
30 the subject of insurance (except change of occupants without
31 increase of hazard); or (e) if this policy be assigned before a loss.

Lines 20 and 21 are similar to the old form which read as follows:

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This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void.—(Line 11.)

The specific changes of language are that the wording of what is now clause (c) (Lines 25-28) formerly was:

if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed.—(Lines 18-20.)

At the end of the present clause (d) the old form contained the following:

whether by legal process or judgment or by voluntary act of the insured, or otherwise.—(Lines 21-22.)

These words were omitted in order to eliminate from the policy a qualifying clause which had been inserted as an attempt to make a change of interest, not attributable to any act of the insured, a voidance of the entire policy.

Except as explained, all the language in lines 20 to 31 of the new policy is taken verbatim from the old form and is to be found in line 11 and lines 16 to 22.

The important change of substance which should be observed in this connection is that in the old policy there were fourteen conditions, a violation of any one of which would terminate the entire insurance (Lines 11 to 30). Under the new policy, the number of conditions which terminate the entire insurance is reduced to five.

The five conditions retained in the new policy, as being of sufficient importance to justify the termination of the entire insurance unless brought to the attention of the company by written endorsement added to the policy, were placed in this category because of their vital importance and their essentially irrevocable character from the insurance point of view.

(a). If the insured is not the unconditional and sole owner of the property, he lacks insurable interest to the extent of the full value of the property insured. The case presented, then, is one where, in case of destruction of the property, the insured loses only the value of a partial interest, but collects the value of the entire property. It is a case where over-insurance is necessarily involved and incentive to protect the property from destruction is necessarily removed. Knowledge of the facts, brought home to the company, is necessary in order to enable the company to limit the amount of the insurance to the insured's partial interest in the property, and the condition presented by such cases is, practically speaking, a permanent condition instead of a temporary one subject to removal during the life of the policy.

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(b) A somewhat similar condition is presented when a building insured is upon ground not owned by the insured in fee simple, for, in such cases, the building is subject to be taken away from the beneficial ownership of the insured and the knowledge of this fact frequently presents a case where the insured becomes tempted to permit a destruction of the property which will enable him to collect the value of the building before it passes out of his possession. This condition also is a permanent rather than a temporary one as a matter of fire underwriting, for it is improbable that, during the life of the policy, the condition will be rectified by purchase of the fee of the property upon which the building stands.

(c) The beginning of foreclosure proceedings or notice of sale by virtue of a power of sale in a mortgage increases the moral hazard of the risk for obvious reasons and, as such proceedings will, in ordinary course, be followed by terminating the insured's interest in the property, the condition presented is not temporary or subject to removal during the existence of the insurance contract.

(d) A change of interest, title or possession (except change of occupants without increase of hazard) is practically always a permanent change so far as the life of any particular policy is concerned. It affects the essential conditions of the insurance and it may increase the moral hazard or require an increase of premium.

(e) An assignment of the policy before loss would change the most essential feature of the contract. If this were permitted without notice to, and consent by, the company, there would remain no opportunity for the company to select the parties which it is willing to indemnify. Such a change amounts to the making of a new and different contract of insurance.

The next paragraph of the new policy begins:

32 Unless otherwise provided by agreement in writing added
33 hereto this Company shall not be liable for loss or damage
34 occurring.

This clause is new. It must be read in connection with each of the clauses marked (a) to (g) following it (lines 35 to 61) as if each of the lettered clauses was immediately preceded by the words in lines 32 to 34 above quoted. The arrangement is for convenience and to avoid repetition.

It should be observed here that, while all of the conditions which follow, numbered (a) to (f) inclusive (lines 35 to 58)

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were conditions of the old policy, the violation of which voided the contract, an essential change has been made as between the new policy and the old in that these conditions hereafter will void the policy only while the prohibited conditions exist, but will not void the entire policy for its entire term as was provided in the old form of contract. In other words, there is an automatic reinstatement of the insurance as soon as the prohibited condition ceases to exist. It is true that in certain jurisdictions and in certain circumstances courts have refused a literal enforcement of the old policy, but it has been unfortunate that the language of the old form was either so harsh or so ambiguous as to permit inconsistent treatment by the courts of various states in the matter of essential conditions of the fire insurance policy. It is hoped that the changes made in the new form will so clearly differentiate between the conditions which are intended to terminate the entire policy (lines 22 to 31) and the conditions which are intended only to suspend the insurance while the violations exist, that uniform treatment of the subject may hereafter be secured.

As to the various matters which suspend the insurance, if not permitted by indorsement the (a) clause (lines 35-37) as to other insurance and the (b) clause (lines 38-40) as to increase of hazard, remain in substantially the same wording as the old policy.

The next clause (c) as to repairs now reads as follows:

41 **Repairs, etc.** (c) while mechanics are employed in building
42 altering or repairing the described premises
43 beyond a period of fifteen days; or

The old form read:

or if mechanics be employed in building, altering or repairing the within described premises for more than fifteen days at any one time.—(Lines 15-16.)

It will be noted that the substitute for the words: "for more than fifteen days at any one time" is the following: "beyond a period of fifteen days." This change was made in order to bring out clearly, as the old form failed to do, the idea that a period of time is intended during which alteration or repair work is conducted although the work may not be continuous for some such reason as that a Sunday intervenes during the period.

The next clause (d) providing for suspension of insurance while certain fire producing materials are on the premises, warrants rather careful consideration. The new policy reads:

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44 Explosives, (d) while illuminating gas or vapor is gener-
45 gas, etc. ated on the described premises; or while
46 (any usage or custom to the contrary not-
47 withstanding) there is kept, used or allowed on the described
48 premises fireworks, greek fire, phosphorus, explosives, benzine,
49 gasoline, naphtha or any other petroleum product of greater
50 inflammability than kerosene oil, gunpowder exceeding twenty-
51 five pounds, or kerosene oil exceeding five barrels;

The corresponding provision of the old form was as follows:

or if illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein; or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used or allowed on the above described premises, benzine, benzole, dynamite, ether, fireworks, gasoline, greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitro-glycerine or other explosives, phosphorus, or petroleum or any of its products of greater inflammability than kerosene oil of the United States standard (which last may be used for lights and kept for sale according to law but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight or at a distance not less than ten feet from artificial light.)—(Lines 22-28.)

The changes are as follows:

The word "Building" (old form, line 23) is changed to "premises" (new form, line 45).

The words following the word "building" which read "(or adjacent thereto) for use therein" are omitted. Thus, under the new policy, the generation of illuminating gas in an adjacent building which is not a part of the "premises" will not void the insurance, although the gas is for use in the insured premises.

The words "of trade or manufacture" which, in the old policy, qualified the words "usage or custom" are omitted (old form, lines 23-24) because believed to be unnecessary as usage or custom include the usages of trade or manufacture as well as all other usages.

The following dangerous products which were prohibited by the old policy are retained as voiding the new policy while they are on the premises: Fireworks, greek fire, phosphorous, explosives, benzine, gasoline, naphtha, petroleum products of greater inflammability than kerosene oil, gunpowder exceeding 25 pounds, kerosene exceeding five barrels.

The having of ether on the premises is permitted by the new policy.

Dynamite and nitroglycerine become prohibited because they are "explosives" although no longer mentioned by name.

Benzole is the same as benzine.

One of the important changes in this section is the elimination of the reference to the "United States standard" for kerosene oil. Present day conditions have rendered this unimportant

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and it is not feasible for the great number of policyholders to test the grade of kerosene. Also, the prohibition against drawing kerosene and filling lamps except by daylight and at least ten feet from artificial light, is omitted. That proper care should be taken will be admitted, but to invalidate insurance for its omission was too severe a penalty.

The new suspension clause, which is applicable to factories only is as follows:

52 **Factories.** (e) if the subject of insurance be a manufac-
53 turing establishment while operated in
54 whole or in part between the hours of ten P. M. and five A. M.,
55 or while it ceases to be operated beyond a period of ten days;

The old form read:

or if the subject of insurance be a manufacturing establishment and it be operated in whole or in part at night later than ten o'clock or if it cease to be operated for more than ten consecutive days.—(Lines 13-14.)

The words "at night" are omitted as unnecessary because the words "later than ten o'clock" are changed to read "between the hours of ten p. m. and five a. m."

It was appreciated that continuous operation of a factory day and night increases the physical hazard of the risk during the day as well as during the night, as the continuous use may result in overheating of bearings, etc. The new form, however, not only prevents a voidance of the entire policy but continues the insurance in force during the day time, even when the clause is being violated by night operation without consent of the company.

This treatment was thought sufficient for the protection of the company's interests as the penalty for violation, while much less severe than in the old policy, should be sufficient to induce the great number of factory owners to give the necessary notice and secure the necessary consent of the Company.

In the last part of the sentence (line 55) the only change of substance is the substitution of "while it ceases" for "if it cease." The effect of this has been fully discussed.

The unoccupancy clause (f) (lines 56-58) is in the old language.

By the new policy the company is not, unless assumed by rider, liable for loss:

59 **Explosion,** (g) by explosion or lightning, unless fire
60 **Lightning.** ensue, and, in that event, for loss or dam-
61 age by fire only.

The old form was as follows:

or (unless fire ensues, and, in that event for the damage by fire only) by

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explosion of any kind, or lightning; but liability for direct damage by lightning may be assumed by specific agreement hereon.—(Lines 34-35.)

By the old form liability was limited to the fire loss following explosion or lightning. Direct loss by explosion could not be covered. Direct loss by lightning might be assumed by rider.

By the new form fire loss following explosion or lightning is covered by the policy without the necessity for a rider.

Both direct loss by explosion and by lightning may be covered provided the additional liability be assumed by rider.

The new chattel mortgage clause is:

62 **Chattel mortgage.** Unless otherwise provided by agreement in
63 writing added hereto this Company shall
64 not be liable for loss or damage to any property insured here-
65 under while incumbered by a chattel mortgage, and during the
66 time of such incumbrance this Company shall be liable only
67 for loss or damage to any other property insured hereunder.

The old form provided that

This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void. * * *—(Line 11.)
or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage.—(Line 18.)

It was felt that the operation of this clause was too harsh, although the principle underlying the clause was a sound one. It was thought that a chattel mortgage should only suspend the insurance upon the mortgaged property but should not affect the validity of the insurance upon any other property covered by the policy. It was also thought that when the prohibited condition was removed the insurance should be reinstated as to the property which formerly had been mortgaged. The clause was revised to accomplish these two purposes.

In testing the scope and effect of the chattel mortgage clause in the new form, the question arose whether, in a case of underinsurance of property, a part of which was encumbered by a chattel mortgage not permitted by endorsement upon the policy so that the company would not be liable for loss to the mortgaged portion of the property, the portion of the insurance otherwise applicable to the mortgaged part would go to increase the insurance of the unmortgaged part of the property. It was felt that the clause as drafted for the new policy would not be susceptible to this construction, for it seems clear that, while liability to pay for loss or damage to the mortgaged property was suspended, the insurance effected by the policy covers the whole of the property described in the policy, including the mortgaged portion, and the reason why the company is not liable

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for the loss to the mortgaged part of the property is not because that property has been excluded from the coverage, but because the insurance protection is suspended as to part of the property while the prohibited conditions are in existence.

The fallen building clause now reads:

⁶⁸ **Fall of Building.** If a building, or any material part thereof,
⁶⁹ fall except as the result of fire, all insurance
⁷⁰ by this policy on such building or its contents shall immediately
⁷¹ cease.

The old form was the same except for the insertion of the word "material."

Many courts held that the old clause must be construed as limited to cases where a material part of the building fell—material in the sense of a substantial or an integral part. Such constructions are reasonable and the authority for them should be found in the contract itself so that all may know their rights without the necessity of consulting judicial reports in order to learn them.

As to the subject of adding clauses to the policy, the new form provides as follows:

⁷² **Added Clauses.** The extent of the application of insurance
⁷³ under this policy and of the contribution to
⁷⁴ be made by this Company in case of loss or damage, and any
⁷⁵ other agreement not inconsistent with or a waiver of any of
⁷⁶ the conditions or provisions of this policy, may be provided for
⁷⁷ by agreement in writing added hereto.

The old form provided that:

the extent of the application of the insurance under this policy or of the contribution to be made by this company in case of loss, may be provided for by agreement or condition written hereon or attached or appended hereto.—(Lines 98-100.)

This clause is continued without substantial change.

But there was another and an essential rule in reference to clauses which might be added to the policy, yet which nowhere appeared in the policy itself. The law of New York (Insurance Law, Section 121) provided that there might be added to the contract

any other matter necessary to clearly express all the facts and conditions of insurance on any particular risk not inconsistent with or a waiver of any of the conditions or provisions of the standard policy herein provided for.

The policy should show on its face what additional clauses may lawfully be added and it was with this in mind that the new matter was included as a part of this clause.

The new clause as to waiver is as follows:

⁷⁸ **Waiver.** No one shall have power to waive any pro-
⁷⁹ vision or condition of this policy except such
⁸⁰ as by the terms of this policy may be the subject of agreement

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81 added hereto, nor shall any such provision or condition be held
82 to be waived unless such waiver shall be in writing added hereto,
83 nor shall any provision or condition of this policy or any for-
84 feiture be held to be waived by any requirement, act or proceed-
85 ing on the part of this Company relating to appraisal or to any
86 examination herein provided for; nor shall any privilege or per-
87 mission affecting the insurance hereunder exist or be claimed by
88 the insured unless granted herein or by rider added hereto.

In this clause there are brought together under a single heading all the provisions of the old form relating to the subject of waiver, a part of which were to be found on the first page of the policy as follows:

and no officer, agent or other representative of this Company shall have power to waive any provision or condition of this Policy except such as by the terms of this Policy may be the subject of agreement endorsed hereon or added hereto; and as to such provisions and conditions no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this Policy exist or be claimed by the insured unless so written or attached.

And another part on the second page as follows:

This Company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for.—(Lines 92-93.)

By doing this the revisers were able to eliminate repetition and useless verbiage and to place all provisions relating to the subject of waiver where they could readily be found.

The new cancellation clause is as follows:

89 **Cancellation** This policy shall be cancelled at any time
90 **of policy.** at the request of the insured, in which case
91 the Company shall, upon demand and sur-
92 render of this policy, refund the excess of paid premium above
93 the customary short rates for the expired time. This policy
94 may be cancelled at any time by the Company by giving to the
95 insured a five days' written notice of cancellation with or with-
96 out tender of the excess of paid premium above the pro rata
97 premium for the expired time, which excess, if not tendered,
98 shall be refunded on demand. Notice of cancellation shall state
99 that said excess premium (if not tendered) will be refunded on
100 demand.

The old form was as follows:

This policy shall be cancelled at any time at the request of the insured; or by the Company by giving five days' notice of such cancellation. If this policy shall be cancelled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this Company retaining the customary short rate; except that when this policy is cancelled by this Company by giving notice it shall retain only the pro rata premium.—(Lines 51-55.)

The cancellation clause of the old standard form is a striking example of the difficulty of making the language of a con-

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tract not only clear but so clear as to render it impossible of misunderstanding.

Notwithstanding the meticulous and careful work of the drafters of the New York standard form of 1886 as applied to this clause, the weight of judicial authority has determined its meaning to be contrary to what was intended. The clause provided that upon cancellation of a policy, the premium upon which had been paid

the unearned portion shall be returned on surrender of this policy or last renewal,

yet many courts have construed the clause to mean that the unearned premium must be tendered at the time of cancellation in order that an attempted cancellation by the company might be effective. Perhaps the leading case on this subject is *Tisdell v. New Hampshire Insurance Co.* (155 N. Y. 163). There is no question that the public interest, as well as fairness to the companies, requires that an insurance company shall be permitted to cancel a policy without tender of unearned premium. It is frequently difficult for the company to reach the insured with a notice of cancellation and this is rendered increasingly difficult in cases where the insured is dishonest and tries to evade a cancellation notice. The undertaking may involve the sending of several notices to different addresses, but should not involve multiple tenders of unearned premium. The public has a vital interest, though an indirect one, in having insurance cancelled in cases where suspicion of intended incendiarism is aroused and, therefore, the companies should be facilitated in effecting such cancellation provided the rights of the insured are protected. Assuming that a company was insolvent, it would be of benefit to any insured to have his policy cancelled so as to enable him to transfer the policy to a solvent company even at the risk of losing the unearned portion of the premium, but, practically speaking companies are always in a position to respond to their obligation to refund return premium. It sometimes happens, however that a policyholder is unaware of his right to collect a return premium on cancellation and provision is made in the new form for giving this information in all cases by requiring a statement in the cancellation notice to the effect that the excess premium, if not tendered, will be refunded on demand.

It is hoped that the statement of the new form that the policy may be cancelled by giving the insured a five days' written notice of cancellation

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with or without tender of the excess of paid premium above the pro rata premium for the expired time, which excess, if not tendered, shall be refunded on demand,

may state the proposition with sufficient clearness and elaboration to avoid conflicting decisions upon this point in the future.

It is also hoped that the clause is drafted with sufficient clearness so that the intention may be effective that only a single notice of cancellation is required, to effect termination of liability at the expiration of five days from receipt of the notice by the assured.

The new policy provides:

101 Pro rata liability. This Company shall not be liable for a
102 greater proportion of any loss or damage
103 than the amount hereby insured shall bear to the whole
104 insurance covering the property, whether valid or not and
105 whether collectible or not.

The old form was as follows:

This Company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property.—(Lines 96-98.)

The words "any loss or damage" are of broader import than the phrase used in the old form and include loss or damage by removal from endangered premises, as this kind of loss or damage is expressly insured against under the new form. The phrase "whether collectible or not" is somewhat broader in its meaning than the phrase "or by solvent or insolvent insurers" and includes all that the old phrase meant.

The new policy provides that:

106 The word "noon" herein means noon of
107 Noon. standard time at the place of loss or damage.

This clause is new. It effects a change in the policy as under judicial construction the word "noon" was generally held to refer to solar instead of standard time. In view of the recent custom of changing time pieces as the result of law or ordinance or common consent, for daylight saving, it becomes important to remember what constitutes standard time. Generally speaking standard time is the time used by railroads under an arrangement made in the year 1883 effective in the United States and Canada. The continent is divided into four sections, each of fifteen degrees of longitude and each section takes the solar time of the centre meridian. Thus "eastern time" is the solar time of the seventy-fifth meridian. It is this system which is now read

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into the insurance policy. It continues regardless of daylight saving regulations based on custom or ordinance rather than statute law.

While such is the general situation as to construction of the words "noon of standard time" the subject has been controlled for the state of New York by statute since the year 1892 (Statutory Construction Law, Section 28; General Construction Law, Section 52). It was at that time enacted that standard time throughout this state should be that of the seventy-fifth meridian of longitude and the New York statute has recently been amended (Laws 1918, Chapter 112) so as to provide that the time of the seventy-fifth meridian of longitude should remain as standard throughout the state except that the standard time of the state should be advanced one hour on the last Sunday of March and retarded one hour on the last Sunday of October. Thus, the daylight saving time is standard in New York state although it differs from the time used by the railroads.

In March, 1918, (Act of March 19, 1918) Congress enacted a statute described as being:

for the purpose of establishing the standard time of the United States.

The act legalized the standard time which had been established by railroad custom, except that it gave to the Interstate Commerce Commission authority to define the limits of each time zone and modify those limits from time to time, having regard for convenience of commerce, and it also carried into the law the daylight saving plan of advancing the time one hour between the last Sunday in March and the last Sunday in October. In August, 1919 (Act of August 20, 1919) the daylight saving feature of the act of Congress was repealed. The existence of the federal law presents a somewhat interesting question in view of its present conflict with the New York State law. In this connection it should be observed that the only effect which the act of Congress purports to have is that the time established by Congress shall govern the movement of common carriers engaged in interstate commerce and shall govern the acts of officers of the United States and the construction of statutes of the United States (Section 2). It seems clear that in view of the limitations of the federal act, the clause of the standard policy of the State of New York established by the legislature is subject to the provisions of the General Construction Law in this state rather than the federal act, and that so long as the daylight saving provisions remain a part of the state law they are read

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into the fire insurance policy as indicating the time when the policy takes effect and when the insurance ceases. No doubt, the same condition exists in any other states which may now or hereafter establish the standard policy by act of legislature and then by another state law standardize time for the state on a basis other than that fixed by the federal statute.

Of course, in the absence of a state law on the subject, standard time is railroad time as there is no conflict between the federal act and the custom of railroads, nor can there be any such conflict, as the effect of any federal legislation necessarily changes the custom of railroads which constitutes standard time and controls the interpretation of the policy in the absence of specific statutes to the contrary.

The new clause as to mortgage interests should be critically considered. It reads:

108 If loss or damage is made payable, in whole
109 **Mortgage** or in part, to a mortgagee not named herein
110 **interests.** as the insured, this policy may be cancelled
111 as to such interest by giving to such mortgagee a ten days'
112 written notice of cancellation. Upon failure of the insured to
113 render proof of loss such mortgagee shall, as if named as insured
114 hereunder, but within sixty days after notice of such failure ren-
115 der proof of loss and shall be subject to the provisions hereof as
116 to appraisal and times of payment and of bringing suit. On pay-
117 ment to such mortgagee of any sum for loss or damage here-
118 under, if this Company shall claim that as to the mortgagor or
119 owner, no liability existed, it shall, to the extent of such pay-
120 ment be subrogated to the mortgagee's right of recovery and
121 claim upon the collateral to the mortgage debt, but without
122 impairing the mortgagee's right to sue; or it may pay the mort-
123 gage debt and require an assignment thereof and of the mortgage.
124 Other provisions relating to the interests and obligations of such
125 mortgagee may be added hereto by agreement in writing.

The only reference to mortgagee interests contained in the old policy was the following:

If, with the consent of this Company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto.—(Lines 56-59.)

It will be observed that under the old form, the only provisions of the policy referred to were "the conditions hereinbefore contained." In other words, the clause in reference to mortgagee interest provided the manner in which the provisions of the policy could be made to apply to mortgagee interests, but provided only a means for making applicable to mortgagee's interest the provisions of the policy preceding lines 56 to 59 and did

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not provide any means whatever for making them apply to mortgagee interests any of the provisions of the policy which followed lines 56 to 59.

It will also be observed that as to the provisions preceding lines 56 to 59 the form provided that they were to apply in the manner expressed in such provisions and conditions as shall be written upon, attached or appended to the policy. In other words, the rider relating to mortgagee interests must be looked to to ascertain how the conditions of the policy were to apply to such interests, and it was only as the rider in reference to mortgagee interests indicated the manner in which the policy provisions preceding line 56 should apply to such interests that they could be held to apply at all.

Under the old form, mortgagee interests were covered in one of two ways, either by a simple loss payable clause reading "Loss, if any, payable to John Doe, mortgagee" or by the standard mortgagee clause.

In the first case, the use of the words "Loss, if any, payable to John Doe, mortgagee" read in connection with the provisions in lines 56 to 59 to the effect that the policy provisions preceding line 56 should "apply in the manner expressed in such provisions * * * as shall be written upon or attached" to the policy rendered it necessary to examine all of the provisions of the policy preceding line 56 in order to ascertain what, if any, loss was payable under the policy, and only such loss, as by this examination of the policy should be found to be payable, was due from the company to the mortgagee who had been made the appointee for payment of the loss. This made the mortgagee's interest in the policy subject to all of the policy conditions preceding line 56 which might constitute a defense available to the company against payment on account of loss. In other words, the mortgagee was subject to defenses available against the insured.

The situation thus presented was, in many respects, unfair. To meet it, the standard mortgagee clauses were prepared and very largely used for the protection of mortgagee interests. By these clauses, a mortgagee is made an appointee for payment through the use of the following language at the beginning of such clauses

Loss or damage, if any, under this policy, shall be payable to blank as mortgagee [or trustee] as interest may appear * * *.

Thus, as in the first case above referred to, where the mort-

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gagee is merely made an appointee of payment, the conditions of the policy preceding line 56 are read into the contract between the company and the mortgagee, but this situation is immediately qualified by the subsequent language of the standard mortgagee clauses which expressly provide that certain of the defenses which would be available against the insured shall not be available as against the mortgagee, that is to say, the mortgagee's interest in the insurance shall not be invalid by reason of any act or neglect of the owner nor by foreclosure proceedings or notice of sale or change of title or ownership nor more hazardous occupation of the property, provided the mortgagee shall notify the company of change of ownership, occupancy or increase of hazard which shall come to his knowledge, and, on demand, pay an increased premium. Also, express provision is made for cancellation of the policy as to mortgagee interests and for subrogation. In certain cases, the mortgagee clause, providing as outlined above, has been used, but with the addition of a provision for full contribution of all insurance whether carried by owner or mortgagee.

By the use of standard mortgagee clauses, a contract reasonably equitable in most respects as to the interests both of the mortgagees and the companies was created, for, under such clauses, the provisions of the policy preceding line 56 were read into the contract except as the mortgagee was freed from forfeiture of the insurance by acts or neglects for which the mortgagee was not responsible and of which he had no knowledge. But, even in the case of use of a mortgagee clause, no part of the policy following line 59 was applicable to the insurance of mortgagee interests. Therefore, such important provisions as those which require notice of loss, right of appraisal and limitation upon time of suit were entirely omitted from the contract with the mortgagee. This feature of the situation was the same whether a simple loss payable clause was used to cover mortgagee interests or whether a standard mortgagee clause was used for that purpose. In other words, the conditions of the policy following line 59 were completely omitted from the insurance contract in reference to mortgagee interests and could not be made a part of that contract because of the unfortunate use of the word "hereinbefore" in line 58. This situation was pointed out in a number of cases, the principal one being *Heilbrunn v. German Alliance Insurance Co.* (140 App. Div. 557, which was affirmed by the New York

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Court of Appeals and is reported in 202 N. Y. 610.) In the Heilbrunn case, the unsatisfactory character of the contract was commented upon and the suggestion made that the standard fire insurance policy should be revised to correct it.

The purpose of the new clause (lines 108 to 125) of the new policy is to continue the rule that the standard policy conditions shall apply to mortgagee interests as the policy conditions may be referred to and made applicable to such interests by rider added to the policy, but to broaden the old form so that any of the policy conditions may be made to apply to mortgagee interests instead of limiting the conditions which may be made so to apply, to a part only of the conditions set forth in the policy. In addition to this, the purpose of the revisers of the new form was to provide expressly certain minimum essential conditions of the insurance contract covering mortgagee interests which should apply although not mentioned in the mortgagee clause attached to the policy. These minimum conditions are (1) cancellation as to the mortgagee upon ten days' written notice, (2) obligation of the mortgagee to render proof of loss within sixty days after notice of failure of the insured to do so (3) making the mortgagee interests subject to the provisions for appraisal (4) time of payment (5) time of bringing suit, and (6) providing for subrogation. Thus, under the new form, if the only clause in reference to a mortgagee interest which is added to the policy is the ordinary loss payable clause there will thereby be read into the contract with the mortgagee all of the provisions of the standard form which are necessary to ascertain what loss is payable under the policy and, in addition, the provisions of lines 108 to 125 will apply to the contract with the mortgagee. If, on the other hand, a mortgagee clause is used, the conditions of the policy necessary to be examined in order to ascertain whether there is any loss under the policy will apply except as modified by the mortgagee clause and, in addition, the provisions of lines 108 to 125 will be a part of the contract with the mortgagee and will supercede any inconsistent provisions which might be inserted in a mortgagee clause.

The new requirements in case of loss read as follows:

126	Requirements in	The insured shall give immediate notice, in
127	case of loss.	writing, to this Company, of any loss or
128		damage, protect the property from further
129	damage, forthwith	separate the damaged and undamaged
130	personal property,	put it in the best possible order, furnish a
131	complete inventory	of the destroyed, damaged and undamaged

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132 property, stating the quantity and cost of each article and the
133 amount claimed thereon; and, the insured shall, within sixty
134 days after the fire, unless such time is extended in writing by
135 this Company, render to this Company a proof of loss, signed
136 and sworn to by the insured, stating the knowledge and belief
137 of the insured as to the following: the time and origin of the fire,
138 the interest of the insured and of all others in the property, the
139 cash value of each item thereof and the amount of loss or damage
140 thereto, all incumbrances thereon, all other contracts of in-
141 surance, whether valid or not, covering any of said property,
142 any changes in the title, use, occupation, location, possession, or
143 exposures of said property since the issuing of this policy, by
144 whom and for what purpose any building herein described and
145 the several parts thereof were occupied at the time of fire; and
146 shall furnish a copy of all the descriptions and schedules in all
147 policies and if required, verified plans and specifications of any
148 building, fixtures or machinery destroyed or damaged. The
149 insured, as often as may be reasonably required; shall exhibit
150 to any person designated by this Company all that remains of
151 any property herein described, and submit to examinations
152 under oath by any person named by this Company, and
153 subscribe the same; and, as often as may be reasonably
154 required, shall produce for examination all books of account,
155 bills, invoices, and other vouchers, or certified copies thereof,
156 if originals be lost, at such reasonable time and place as may
157 be designated by this Company or its representative, and shall
158 permit extracts and copies thereof to be made.

This is a revision of lines 67 to 85 of the old form.

The substantial changes from the old form are as follows:

(1) The insured must not only make an inventory but "furnish" the inventory to the company. Under the old form, it sometimes happened that an insured would insist that he had complied with the policy conditions by making the inventory without giving the company any beneficial use of it.

(2) The inventory, under the new form, shall include not only the damaged and undamaged personal property as formerly, but all property which was damaged or undamaged and, in addition, an inventory of the destroyed property. Such clauses are always interpreted as limited by the ability of the party to perform them and the insured will be required under the new clause to state all that he knows or can, with reasonable diligence, find out as to the items of destroyed, damaged and undamaged property.

(3) The obligations of the assured to exhibit all that remains of property and to submit to examination under oath and to produce books and vouchers are all qualified by the phrase "may be reasonably required."

(4) Under the old policy, the place required for production of books must be reasonable and under the new policy, not only

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the place, but the time for such production as may be required by the company must be reasonable.

(5) The old policy provided that the insured shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify.—(Lines 77-80.)

This clause is omitted from the new policy. As Mark Twain might have said—just this one omission would make a reasonably good policy out of a policy that had no other clauses in it.

The provisions of the new policy as to appraisal are as follows:

159 **Appraisal.** In case the insured and this Company shall
160 fail to agree as to the amount of loss or
161 damage, each shall, on the written demand of either, select
162 a competent and disinterested appraiser. The appraisers
163 shall first select a competent and disinterested umpire; and
164 failing for fifteen days to agree upon such umpire then, on
165 request of the insured or this Company, such umpire shall be
166 selected by a judge of a court of record in the state in which
167 the property insured is located. The appraisers shall then
168 appraise the loss and damage stating separately sound value
169 and loss or damage to each item; and failing to agree, shall
170 submit their differences only, to the umpire. An award in
171 writing, so itemized, of any two when filed with this Company
172 shall determine the amount of sound value and loss or
173 damage. Each appraiser shall be paid by the party selecting
174 him and the expenses of appraisal and umpire shall be paid
175 by the parties equally.

The old form read:

In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this Company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the appraisal and umpire.—(Lines 86-91.)

The important changes made by the new form, in so far as the subject of appraisal is concerned, are as follows:

(1) Compulsory selection of an umpire by an impartial tribunal is provided for. Appraisals under the old form frequently failed because of the necessity that the two appraisers should be able to agree upon an umpire in order that he might be selected. Their disagreement, whether from design or otherwise, was sufficient to block the appraisal and throw the matter of loss adjustment into the courts. In the year 1913, the State of New York, following the example of some of the other states, enacted

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a law to the effect that when the appraisers had failed or neglected for a space of ten days after both had been chosen to agree upon and select an umpire, it should be lawful for either the assured or the company to apply to any court of record in the county in which the property was situated, on five days' notice to the other party, to appoint a competent and disinterested umpire (Laws of 1913, Chapter 181).

The new sentence (lines 162 to 167) is in line with the recent legislation for the selection of an umpire in case of failure to agree and is undoubtedly in the interest of the efficient adjustment of losses where only questions of value are involved. Under the new clause, if the appraisers fail for fifteen days to agree upon an umpire either party may, without notice to the other, apply to a judge of any court of record in the state for the appointment of such umpire. The effect of this clause should be for the future what it has been in the past, that is to say, in most cases the opportunity to compel the selection of an umpire results in the appraisers agreeing as to the person who shall be selected before the expiration of the fifteen-day limit.

(2) The new form requires that the appraisal shall be itemized. To this end, it is provided that the appraisal shall state the sound value and the loss or damage "to each item" (line 169) and that the award "so itemized" (line 171) shall determine the amount. The purpose of this change is to compel the appraisers to do their duty intelligently and to avoid the loose and unsatisfactory work which, in the past, has frequently been prejudicial to one or the other of the parties in interest.

(3) Another change in the new form is the addition of the word "only" in line 170. It was implied in the old form that only differences arising between appraisers should be submitted to the umpire. But the failure to state this clearly has resulted, in many cases where the umpire and one of the appraisers practically make the award without participation by the other appraiser. The appraisers should be compelled to attempt, in so far as possible, to agree before calling upon the umpire to settle their differences.

(4) Under the old form, the award determined only the amount of loss and damage. Under the new form, the award will, in addition, determine the sound value of the property (line 172). Thus, the award, in the future, will be in such form as to serve as a foundation for a settlement of all differences as

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to value, including such differences as may arise as to the relation of insurance to value, which becomes of importance wherever there is a question involving co-insurance.

The clause as to the company's options now reads:

176 **Company's** It shall be optional with this Company to
177 **options.** take all, or any part, of the articles at the
178 agreed or appraised value, and also to
179 repair, rebuild, or replace the property lost or damaged with
180 other of like kind and quality within a reasonable time, on
181 giving notice of its intention so to do within thirty days
182 after the receipt of the proof of loss herein required.

The old form was as follows:

It shall be optional, however, with this company to take all, or any part, of the articles at such ascertained or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice within thirty days after the receipt of the proof herein required, of its intention so to do.—Lines 4-5.

The changes of phraseology are as follows: The word "however" is omitted. The words "such ascertained" are changed to "the agreed." The words "of loss" are added after "proof" (line 182). The phrase "of its intention so to do" is transferred so as to follow the word "notice."

The clause prohibiting abandonment of property (lines 183-184) is substantially unchanged.

The new policy provides:

185 **When loss** The amount of loss or damage for which
186 **payable** this Company may be liable shall be payable
187 sixty days after proof of loss, as herein
188 provided, is received by this Company and ascertainment of
189 the loss or damage is made either by agreement between the
190 insured and this Company expressed in writing or by the
191 filing with this Company of an award as herein provided.

The old policy contained two clauses in reference to time of payment, one expressed in the affirmative, as follows:

and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy. (Lines 3-4.)

and the other expressed in negative form, which read as follows: and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required. (Lines 93-95.)

Except in the case of denial of liability, which throws the claim into controversy and litigation, the "ascertainment" of the amount due under the policy is made in either one of two ways:

1. By agreement between the insured and the company,

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2. By award of appraisers.

The "ascertainment" may be made within the sixty-day period allowed for filing proof of loss. It may, and in the case of appraisal and award, usually does follow that period. As a matter of sound public policy, as well as for the protection of the company's interests, a means should be provided for compelling the rendition of a proof of loss in connection with the payment of any loss, however, the amount thereof may be ascertained, and the policy clause provides that the liability for payment shall be sixty days after the two acts necessary to fix and prove the amount due, have been performed by the assured. One of these acts is the filing of proof of loss with the company, and the other is the ascertainment of the amount, either by written agreement or the filing of an award of appraisers, depending upon which of the two means of ascertainment is taken by the parties.

By the old form the time of payment was dependent, not only on the rendition of the proof of loss and the ascertainment of the amount due, but also upon the giving "due notice" of the loss and an "estimate" thereof. The conditions of notice of loss and estimate thereof as bearing upon the time of payment, are eliminated. In the old form, it was provided that the time of payment was sixty days after "satisfactory proof of loss." The word "satisfactory" has been omitted and no longer qualifies the phrase "proof of loss." The question of what is satisfactory to the company as a proof of loss no longer arises and the only test of what constitutes a proof of loss is the definition thereof as contained on the face of the policy. If the proof conforms to the requirement of the policy it must hereafter be satisfactory to the company.

The provision as to limitation of action on the policy is as follows:

192	Suit	No suit or action on this policy, for the
193		recovery of any claim, shall be sustainable
194		in any court of law or equity unless all the requirements of
195		this policy shall have been complied with, nor unless com-
196		menced within twelve months next after the fire.

This compares with the following language of the old form:

No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire. (Lines 106-107.)

The compliance required by the old form "by the insured" was unnecessarily restrictive. The compliance which should be required as a condition precedent to recovery by suit is a

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compliance with the terms and conditions of the contract, either by the party plaintiff to the suit or by his predecessor in interest under the contract, or both, as the case may require. It may be that suit is instituted by the legal representatives of the insured after death or by the legal successor in case the insured is a corporation. It may be that the cause of action for loss under the policy is assigned by the assured after loss. It may be that the suit is founded upon a mortgagee interest in property destroyed and that the contract covering such interest is valid and binding upon the company, although the insured has failed to comply with the provisions of the policy. The duty of compliance with the contract under the new clause falls upon the party plaintiff to the suit and any prior party to the contract through whom he derives his interest.

The new subrogation clause is as follows:

197 Subrogation This Company may require from the insured
198 an assignment of all right of recovery
199 against any party for loss or damage to the extent that pay-
200 ment therefor is made by this Company.

This compares with the language of the old policy which reads:

If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment. (Lines 102-105.)

Under the new form it is not necessary that the company shall assert the existence of a claim for recovery over against a third party. It may require as a condition of payment of loss an assignment of such right of recovery as the insured may have against a third party, leaving the question of the existence of a valid claim to be ascertained by future examination of the facts bearing upon the matter.

It may be interesting to note the differences in form, arrangement and length as between the old and the new policy contracts.

The old standard form was so long and so lacking in arrangement that the assured was required to read practically the entire policy whenever he desired to ascertain any of his rights or obligations. In revising the policy, every effort was made to shorten it. It was found, however, to be utterly impracticable to make the policy appreciably shorter without sacrificing either the substantive rights of the parties or their clear expression.

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The old policy contained 2,441 words while the new policy contains 2,063 words, a shortening to the extent of 378 words.

The condition of the law in reference to insurance of mortgagee interests was found to require additional provisions in the new policy not contained in the old standard form. Thus, the part of the new policy devoted to a definition of the rights and obligations of mortgagees contains 189 words, whereas the old policy provision comprised only 73 words, so that aside from the mortgagee interest clauses the new policy has been shortened to the extent of 494 words out of a total of 2,441.

While it was not feasible to provide for the policyholder's convenience a contract very much shorter than the old standard form so far as the actual number of words used, a great improvement in this respect was effected by dividing the policy into three parts—combining in the first part of the policy all the provisions defining the rights and obligations of the assured before loss, following this by the provisions relating to mortgagee interest and then adding at the end of the policy all the provisions applicable after a loss has occurred. The first part of the policy under this classification comprises 1,159 words and, thus, the policyholder, for his protection and information, prior to a loss, is required to read less than half the number of words which were necessary to examine under the old standard form. If the insured is a mortgagee, the second part of the policy must be read, comprising 189 words. It is necessary for the assured to read the balance of the policy (comprising 716 words) only, in the event of a loss, to inform himself of his rights and duties after the happening of a loss.

The convenience of the assured is also materially increased by the use of a marginal index.

In conclusion, I shall refer to a single point which may prove to be the most important feature of the new policy. As the old policy was concededly framed by the companies and by them presented to, and filed with the Secretary of State, it has always for that reason, been judicially construed by resolving all doubtful points against the interests of the companies which drew the contract. The new policy does not admit of this interpretation. It was prepared at the direct instance of the New York Legislature. The work was done as the Legislature prescribed, under the direct auspices of the National Association of Insurance Commissioners. Every line and word of the new form has the

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authority and the sanction of the supervising officers of the country acting in the general interest of the insurance public. There is no longer opportunity to claim that the policy should be construed against the interest of one of the parties and in favor of the other. It has been given the authority and the prestige of a clear enactment of the New York Legislature, and in addition it is so completely the work of the National Association of Insurance Commissioners, as to entitle it to be called henceforth The National Insurance Policy.

IV

FUNDAMENTALS IN THE LAW OF INSURANCE AND WHY ADOPTED

GEORGE RICHARDS

Richards and Affeld, Lawyers

The law of insurance owes its origin and early development to the skill and intelligence of business men. The leading doctrines of insurance law are founded upon trade usage, and trade usage is the result of the experience, not of lawyers, but of the mercantile community—underwriters, brokers—lay experts like yourselves.

John Duer, one of our most learned judges, writing of insurance in his lectures, says: "Merchants were its sole inventors; the custom of merchants supplied the rules by which it was governed, and, for a long period, all its controversies were exclusively decided either by the arbitration of merchants, or by tribunals especially established for their use. It was not a subject of positive law, nor within the jurisdiction of the ordinary courts of justice." And to similar effect, the United States Supreme Court declares "the contract of insurance is an exotic in the common law."

While proud of some of our American institutions, we must frankly admit that the fundamentals of our insurance law, like our common law generally, came to us as an inheritance from England, and the amazing fact is that until the beginning of the seventeenth century, although marine insurance had been practiced to a considerable extent in that and other countries of Europe for hundreds of years, we find no English statute relating to the subject, and no case in the common law reports shedding light on the meaning of the insurance contract.

In the earliest act of Parliament relating to insurance, adopted in 1601, occur the following recitals:

Whereas, it hath been time out of mind an usage amongst merchants * * when they make any great adventure * * to give some consideration of money to other persons, * * to have from them assurance made of their goods * ships and things adventured * * which course of dealing is commonly termed a policie of assurance, * * and, whereas, heretofore, such assurers have used to stand so justly and precisely upon their credits as few or no controversies have arisen thereupon, and if they have grown, the same have from time to time been ended and ordered by certain grave and discreet merchants appointed by the Lord Mayor of the City of London, etc.

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These instructive statements sanctioned by Parliamentary authority are sufficient guaranty to us that the principles of insurance law, prevailing in England prior to the year 1601, must have been formulated without substantial aid from the common law courts of that country.

To investigate, then, the origin of insurance law as based upon trade custom, I shall ask you to take a brief glance at the maritime situation as it existed in England prior to the date of that statute, giving special attention to the reign of Queen Elizabeth which extended from 1558 to 1603. At about this time the Lombard merchants, who probably had introduced the practice of marine underwriting into England one or two centuries earlier, were drifting back to Italy, leaving as mementoes the word "policie," which is of Italian derivation, and the name "Lombard Street," which is still mentioned in the English policy. With the aid of the mariner's compass, Drake, Raleigh and other adventurers were sailing to the four quarters of the globe. In this reign, the East India Company was chartered, the Royal Exchange was built—the famous meeting place for underwriters and brokers and subsequently the home of Lloyds—the first lay commissioners were appointed to settle insurance disputes, and the first office was established in London for registering insurance contracts.

The conventional form of the marine insurance contract in common use was simple and one-sided, one-sided in favor of the insured. The only express obligation resting upon him was the duty to pay the premium. If some special warranty was required to complete the agreement of the parties, it became the subject of present consideration and was added to the policy as a well understood clause. For example, "warranted the ship in good safety;" "warranted the ship is neutral;" "warranted no Gulf of St. Lawrence in winter months;" "warranted not to proceed east of Singapore;" "warranted not to load in excess of a certain tonnage," etc.

On the other hand, the obligations of the underwriters were sweeping and liberal. The policy established by Florentine ordinance of 1523 reads as follows:

The said assurers taking upon themselves, the risk of all perils of the seas, fire, jettison, reprisals, robbery by friend or foe, and every other chance, peril, misfortune, disaster, hindrance, misadventure, though such as could not be imagined or supposed to have occurred, or be likely to occur. * * And the insurers are bound first to pay to the aforesaid the sums insured, and to litigate afterwards.

Compare with this policy, if you please, the form of the pro-

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posed standard fire policy now before our legislature, for the terms of which the able and untiring efforts of our friends, Mr. Rumsey and Mr. Shallcross are so largely responsible. I am not here to cast reflections upon that policy. Indeed, I felt greatly honored to be able to share in the framing of certain of its provisions. But the truth is that, even in that liberal form, the major part is occupied with restrictive clauses and with statements of what the *insured* must and must not do.

The early English policies, to be sure, were not so impracticable as to require payment of loss before litigation, even upon security furnished to the underwriter, but, nevertheless, you may easily infer that the mercantile community, and subsequently the common law judges, felt under pressure to devise rules which would adequately protect the pioneer insurers from fraud and imposition, and also from mistake as to the character of the risk to be assumed.

In making any correct estimate of the proposed hazard, underwriters, in those early times, were largely at the mercy of the applicant. An inspector could not be despatched over night even to the neighboring cities of Antwerp or Havre to survey ship or cargo. There were no railroads, or steamships or telegraphs. Maritime intelligence traveled slowly. Lloyds' List, with cabled news from all parts of the civilized world, and Lloyds' Register of Shipping, with detailed description of all vessels, had not yet been so much as thought of; and the Coffee House of Edward Lloyd, in which the marvelous institution of Lloyds, named after him, had its beginnings, had not yet displayed its unpretentious sign in Tower Street. There were no insurance corporations or insurance companies, such as we know. Insurance was a matter of marine underwriting, and of individual dickering without aid of scientific schedules of rates or elaborate surveys of risks.

The owners of ships and shipping merchants were on either side of the contract. In one instance they figured as insurers and in the next as the assured. They were not scattered over a country three thousand miles in width. Most of them were represented in person, or by agents or brokers, in the one metropolis of London, and in that city, not too far from the River Thames. They were extraordinarily well situated for the conduct of their trade, and with the help, doubtless, of certain customs, and ordinances, borrowed from Barcelona, Florence and other cities, they gave shape to regulations for the management of this rapidly expanding busi-

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ness of insurance, so vital to England's prosperity, especially in times of war.

And what were some of the leading doctrines which these lay experts of early times adopted and applied, governed as they were by the surrounding circumstances which I have thus endeavored to portray?

The contract of insurance, they concluded, is peculiarly a contract calling for good faith. It is a speculation in the nature of a bet. The true sport must not bet on a certainty. The subject of the contract of insurance is a chance. Both parties must contract with reference to the same chance. Hence facts material to the risk, known to one party only, must be affirmatively disclosed to the other party. What is naturally unknown to both parties need not be ferreted out and disclosed by either, since the unknown enters into the chance which is to be assumed. If the underwriter, through some private channel, is informed that the proposed adventure is already ended, it would manifestly be a fraud for him to accept a premium for insuring it. No chance remains. If the owner is advised that his ship or cargo is already in peculiar peril, or in any way impaired, and does not say so, the chance to him is one thing, and, to the underwriter, another thing.

This in few words was the doctrine of concealment and the reasons for it. On this subject the policy was silent, but the obligation to disclose material facts was made an implied condition on which the validity of the insurance depended. The rule was exceptional, and at variance with the maxim *caveat emptor*, let the purchaser beware, governing the ordinary contract of sale when unaccompanied by express guaranty. The rule was exceptional in another respect, for at common law the general theory is that where parties have reduced their agreement to writing, the contract as written is presumed to embrace the entire agreement, and, if without ambiguity in its phraseology, is the sole admissible evidence of the agreement. But not so at all in the law of insurance. Here, various important provisions, though unexpressed, have always been implied as a part of the contract of marine insurance; for example, that contributions towards general average losses caused by a peril named are covered by the policy; and that, if the insurance is short of value, the insured is co-insurer for the deficiency.

This same doctrine of fair dealing imposed upon the insured the further implied warranties that at the start the ship must be

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fit for the adventure, both in structure and equipment, and that it must not deviate from the customary course of the voyage without legal excuse.

Again, the principle was recognized that insurance, in its nature, is a contract of indemnity. Hence the claimant under the policy must show an insurable interest unless the parties had expressly stipulated to the contrary. The doctrine that an insurable interest is essential to sustain the validity of the contract was adopted later, on grounds of public policy. The doctrine of indemnity involved also the right of subrogation, and the right of insurers to exact contribution towards the loss as among themselves, rules with which you are quite familiar.

In actions for tort, contributory negligence on the part of the plaintiff constituted a good defense, but, under the principles of insurance law, indemnity was allowed to the insured for loss by the peril named, despite the contributing negligence of himself or others.

Bearing in mind the form of the early contract, and the manner in which the business was conducted, we are not surprised that where the parties deliberately inserted upon the face of the policy any statement of fact or any promise of performance, it became a warranty which must be exactly fulfilled, a failure involving forfeiture of the insurance. This doctrine, so conspicuous in the law of insurance, has descended to modern times by force of precedent, and is often applied to our more elaborate and complex policies.

With all proper respect to the merchants and brokers of Britain and other maritime nations, we recognize that friendly awards and trade understandings do not quite fill the place of a system of law elaborated by trained judges, whose decisions are enforceable by sheriffs, and whose opinions are officially reported for the future guidance of the whole community. And though this survey of our subject is necessarily brief we must not altogether ignore the rulings of the courts.

Almost exactly two hundred years after Queen Elizabeth ascended the throne, Lord Mansfield ascended the Kings Bench. He, doubtless, did more than any other judge of any age to systematize the law of insurance. He was a great judge in commercial law generally, and it is said that out of thousands of judgments rendered by him only two cases were reversed on appeal. Up to the beginning of his term in 1756, there had been very few decisions reported in the common law courts on the subject of insurance.

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To assist him, he established at Guildhall a body of special jurymen, expert in the usages of trade, and Lord Campbell in his "Lives of the Chief Justices" says that one of these jurymen, who wore a cocked hat, had almost as much authority as Chief Justice Mansfield himself.

.And now may I ask you to examine with me a few cases, ancient and modern, which I have selected from the official reports with some care to aid us in our present discussion.

On the 27th of June, 1740, the owner of the ship *Davy* wrote from abroad to his London agent to procure insurance. The letter was received the 25th of the following August. On this day the defendant, as requested, underwrote a policy on the ship *Davy*, lost or not lost, Carolina, U. S. to Holland. Two days before this the plaintiff's agent had received a letter dated August 21st from an acquaintance who had arrived at Cowes, England, containing these statements: "12th this month I was in company with ship *Davy*; at 12 in night lost sight of her all at once. Captain spoke to me day before, that he was leaking. Next day hard gale." The contents of this letter were not disclosed to the underwriter when application was made for the policy. The condition of the vessel, however, had nothing to do with the loss, for the voyage was safely continued until August 19th, when the ship was captured by hostile Spaniards. On the trial at Guildhall, several brokers were called, who testified that the plaintiff's agent ought to have disclosed the letter; that upon disclosure, the underwriter would not have accepted the risk, or would have accepted it only at a higher premium. The jury found for the defendant.

The entire official report of this case⁽¹⁾ occupies little more than half a page, but it is instructive. It shows a leaning upon the opinion and experience of the expert brokers, who were allowed to usurp the function of judge and announce from the witness chair the sound rule of law. The matter concealed may have no relation to the cause of loss; but was it calculated to induce the underwriter to reject the application, or to accept it only at a higher premium? That is the test.

A vessel named *Christy Johnstone* was insured "at and from Plymouth to the Banks, codfishing, and at and thence back to Plymouth." She took the usual quantity of bait, insufficient, however, for the trip, the practice being to rely principally on catching squid on the Banks to use for bait. This year the squid, though formerly plenty, were scarce, and in order to procure bait the

1 *Seaman v. Fonereau*, 2 *Strange* 1183.

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master was obliged to go to port at St. Peters, the trip thither with return to the Banks occupying about a week. Subsequently, while fishing on the Banks, the vessel sprung a leak in a severe gale and was totally lost. The court held that while the plaintiff's vessel might have delayed for any reasonable time upon the Banks for the purpose of the voyage, for example in the occupations of fishing or getting bait, without being guilty of deviation, yet to depart from the specified route, though absolutely essential to the successful conduct of the trip, and though the departure had nothing to do with the loss, was in law a deviation, which avoided the policy.⁽²⁾

In an English case the insurance was upon any craft employed in loading the ship *Britannia*. A sloop was so engaged one day in transferring sugar to this ship over a distance of some fifteen miles while the ship was anchored at St. Kitts, West Indies. The sloop was in charge of the ship's mate and three of its seamen and four negro laborers. There is sometimes a suspicion of the presence of Jamaica rum in that region, and, at all events, at about eight o'clock in the evening, first the mate and shortly thereafter all the seamen and negroes fell asleep on the sloop, which, thus neglected, drifted ashore where it was seriously injured by winds and waves. Counsel for the underwriter urged that the cause of loss was the negligence and misconduct of plaintiff's agents, but the court held that the peril insured against, to wit, the winds and the waves, must be taken as the controlling cause, in spite of the proven negligence of the agents of the insured. The court further held that while the warranty of seaworthiness demanded a competent master and crew at the start, it did not require that they should be careful during the voyage.⁽³⁾

Another ship was warranted to sail with fifty hands or upwards. In fact, she began the voyage from Liverpool with only forty-six. But six hours later, at the island of Anglesea, she took on six more seamen, making fifty-two in all, and this while the pilot was still aboard, and before there was any occasion for employing more than forty-six. Later, on the high seas, the ship was captured by the enemy. Lord Mansfield held that the policy was avoided by reason of the breach of warranty, in that the voyage was begun without the stipulated fifty hands.⁽⁴⁾

This case strikingly illustrates the severity of the doctrine of warranty in the law of insurance, which is in marked contrast with other branches of the law. For example, a substantial compliance will avail, with equitable adjustment for the contract price, in case of

² *Burgess v. Equitable Mar. Ins. Co.*, 126 Mass. 70.

³ *Walker v. Maitland*, (1821) 5 Barnewall & Alderson, 171.

⁴ *Dehahn v. Hartley*, (1786) 1 T. R. 343.

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a building contract; and a lease still stands, despite certain breaches of warranty, for which, however, a claim for damages may be recoverable. But the contract of insurance is exceptional; you pay two dollars and purchase two dollars worth of flour; you pay two dollars and purchase a thousand dollars of insurance, based, however, upon conditions. These conditions evidently constitute a most essential part of the agreement. Except as they are precisely complied with, this great disparity between the amount of premium and the amount of insurance is not equalized.

In another case the ship was warranted to sail with convoy. Voyage from London to Naples. This ship started with convoy, but was separated from the convoy by a tempest, which drove it out to sea, and off its course, where it was captured by pirates. Here was no breach of warranty, for a peril insured against caused the mischief of separation; and another peril insured against was the proximate cause of loss.⁽⁵⁾

Courts in modern times have continued to enforce the strict rule regarding warranties, when the thing warranted is expressed without ambiguity.

Thus, in his accident policy, Gaines warranted that the payee was his wife. Gaines died. The wife brought suit on the policy. It was shown on the trial that when the policy was issued the plaintiff was living with the insured as his wife, to all appearance, and, indeed, had gone through the form of a marriage ceremony with him, but in fact, she had a prior husband living. She was not the lawful wife of the insured. The misstatement as to relationship appeared to be wholly immaterial, and counsel argued that the private affairs of this couple were of no concern to the insurance company; but the New York Court of Appeals held the policy avoided for breach of warranty.⁽⁶⁾

In an Arkansas case the application was made part of the contract of fire insurance and warranted by the insured. In it he stated that his house, on which he requested a policy of \$1,200, cost \$2,000, when in fact it cost but \$1,700. This slight discrepancy, however, seemed unsubstantial, inasmuch as the policy amounted only to \$1,200, considerably less than the actual cost of the house. Nevertheless, the majority of the court adjudged the policy void.⁽⁷⁾

In a Virginia case, the insured, having erected his building upon a pier built upon the bed of Chesapeake Bay, rented it to one

⁵ *Joffery v. Legender*, (1891) 3 Lev. 320.

⁶ *Gaines v. Fidelity & Cas. Co.*, 188 N. Y. 411.

⁷ *Capital Fire Ins. Co. v. King*, 82 Ark. 400.

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Livingston, who, without consulting with the insured, gave permission to a man by the name of Wells to set off fireworks on the pier on the night of the Fourth. The insured building was ignited and damaged in consequence. Here not only was the forbidden use temporary, but the insured, having no knowledge of it, was no more at fault than he would have been if his house had been struck by lightning. Nevertheless, the warranty against the use of fireworks on the premises had not been kept, and the recovery by the insured below was reversed on appeal.⁽⁸⁾

Sometimes, however, the literal meaning of a warranty, in a general printed form of contract, seems so incongruous when applied to the particular instance, that the courts have evaded it, having regard to the main purpose of the contract. An interesting illustration is to be found in a recent case under the English Workmen's Compensation Law. A farmer insured against liability under that law. There was a warranty in the policy that the name of every employee and the amount of wages and salary paid to him should be duly recorded in a wages book. No wages book was kept. The farmer employed only one person, and that his son, at seventy-five pounds a year. The son lost his hand and was paid under the terms of the Act. The judges of Kings Bench on appeal, by a vote of two to one, refused to find a breach of condition avoiding the policy.⁽⁹⁾

By similar course of reasoning, the courts in this country and England have refused to apply the one year limitation clause of the usual fire insurance policy to a policy of reinsurance, though the standard conditions were a part of it.

In order to avoid technical and seemingly unconscionable forfeitures, the courts, and especially the American courts, have adopted certain rules modifying the strict rule of warranty, and these modifications in certain instances have introduced great uncertainty and confusion into the law of insurance.

The first rule, however, can hardly be criticized. It is that any ambiguity in the language of a policy, the policy being prepared by insurance men and in their interest, shall be resolved by a liberal construction in favor of granting indemnity for the loss.

An admirable illustration is found in New York. The insured personal property was stated to be contained in a storehouse situate detached at least one hundred feet on the east side of Lake Cham-

⁸ *Westchester F. Ins. Co. v. Ocean View Pleasure Pier Co.*, 106 Va. 432.

⁹ *In re Bradley, etc., Accident Indem. Soc.*, (1912) 1 K. B. 415.

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plain in the town of Shoreham. The court held that this statement must be construed to be a warranty, but they found ambiguity as to what the warranty was. The policy said, "detached at least a hundred feet," but it did not specify the object from which it was detached. It appeared that there was a small building with a little gunpowder in it located seventy-five feet from the storehouse; but it also appeared that this did not increase the risk on the property insured. The court, accordingly, construed the warranty as meaning detached at least a hundred feet from some building which would increase the hazard on the property insured.⁽¹⁰⁾

This rule of construction is not a novel one. Lord Mansfield applied it in the year 1778 in a case before him in which the ship was warranted to sail with thirty seamen, besides passengers. To make good the number of thirty seamen it was necessary to count in the steward, the cook, the surgeon and certain boy apprentices on board. Lord Mansfield held that the insured was entitled to do this, and that there was no breach of warranty.⁽¹¹⁾

Another rule in mitigation of the strict doctrine of warranty is this, that exact compliance will be required only as applied to statements of fact or promises of performance, and that good faith will be held sufficient in the case of statements of opinion, expectation or belief, though in the form of warranties.

Thus, Owen, the insured, died about a month after procuring a policy from the Metropolitan Life Insurance Company. Defense was made on the ground that, in his application, he had warranted that he had never had heart disease. Owen's heart was seriously affected prior to his proposals, but he did not know it. The court concluded that only good faith was required, and that the jury were at liberty to find that his representation regarding this obscure disease was given according to his *bona fide* belief, and that the policy was not avoided.⁽¹²⁾

The last of these rules that I shall mention at this time is the one which has occasioned the greatest amount of confusion, and that is the doctrine of parol waivers. By this doctrine, though his action is brought upon the policy, the insured is allowed to show by oral evidence of what occurred at or before the making of the contract that the understanding between the parties was radically different from that expressed in the policy. For example, the insured has avoided his policy by reason of other insurance without written

10 *Burleigh v. Gebhard Fire Ins. Co.*, 90 N. Y. 220.

11 *Bean v. Stupart*, 1 Dougl. 11.

12 *Owen v. Metropolitan Life Ins. Co.*, 74 N. J. L. 770.

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permit, or by some breach of warranty. You will recall that the courts of New York and of the majority of the States, allow the insured, or his witness, in such a case, to testify orally that the countersigning agent had knowledge of the other insurance, or the other facts constituting breach, before the policy issued. The agent generally denies this, but the jury attaches little importance to the point one way or the other and, ignoring it, finds for the insured. This rule of course is utterly at variance with common law doctrines of evidence, and is, therefore rejected by the courts of England, by our federal courts and the state courts of Massachusetts and New Jersey.

Basing my opinion upon experience as well as theory, I am convinced that the last named courts have much the better of the argument, both in the interest of justice and of public safety. The sanction of the written agreement is needed for the protection of both parties, if they are honest; and the fire loss *per caput* in this country, as you are well aware, is several fold greater than it is abroad, a fact carrying persuasion that the public are entitled to the benefit of the protective clauses of the policies. Invoking this doctrine of parol waivers, however, claimants, and especially unscrupulous claimants, sweep out of our policies, both fire and life, all the conditions and warranties though inserted therein by legislative enactment, and this is done without the payment of any additional premium. To try the issue before a jury seems to me almost farcical. If the contract as written does not need reforming, it should be enforced as it reads. If it does need reforming, the issue should, in my opinion, be determined, as in all other cases, by a judge sitting in equity, and under the rules of evidence peculiar to that procedure. An equity issue is promptly disposed of in this and many States, and in the same action the insured may collect any insurance money to which he is entitled.

Observing the marked disposition of courts and legislatures to favor the underwriter, under the simple conditions of the early marine policy, and their no less marked disposition to favor the insured, under the modern fire insurance policy, the question presents itself to us, whether it would have been wiser for the fire insurance companies to have omitted from their early policies most of the fine print conditions appertaining to the situation prior to the fire, relying instead upon the two common law doctrines, first, that all matters material to the risk must in general be affirmatively disclosed by the applicant for insurance, and, second, that the insured must

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not voluntarily enhance the risk during the term of insurance. This inquiry, which has for many years enlisted my interest, has a direct bearing upon the vastly important proposal now pending (March, 1917) to adopt a new and simpler fire insurance policy for the whole country, and I submit the question, suggesting that the marine underwriter has undoubtedly fared far better with the aid of the common law doctrine of concealment, enforced as it is by the courts, than has the fire insurance company with its express and apparently sweeping warranty upon that subject, limited as it usually is in the United States to intentional or fraudulent concealment. Referring to a fine print condition of an elaborate fire policy in common use before the standard policies were adopted, our Court of Appeals likened the clause to a tiger "crouched unseen in the jungle of printed matter with which a modern policy is overgrown," and thereupon concluded to sustain a finding of waiver. Indeed it may be truly stated, in a general way, that while the implied warranties of the marine policy have been respected by all our courts, the express warranties of the fire and life policies, have been to considerable extent evaded by our courts, though no doubt with the intention of accomplishing justice.

In conclusion, the four doctrines of indemnity, concealment, warranty, and parol waivers, seem to me to be the most distinctive and practically important in the law of insurance. These doctrines and the reasons for their adoption we have thus briefly reviewed.

V

CASH VALUE

L. C. WILLIAMS

General Agent and General Adjuster, Atlas Assurance Co., Ltd.

The meaning of the phrase "Cash Value" as applied to a policy of fire insurance is the cash value of property insured to an owner at the time a fire occurs, and is the measure of damage.

On account of the many classes of property and interests insured there are of necessity varied phases of what constitutes an actual cash value.

Unfortunately many laymen labor under the impression that an amount agreed upon between an agent of the Company or a broker as the amount of insurance to be carried constitutes the cash value of the property insured or the sum to be collected in the event of a fire. Some agents even overlook the most important fact that the underlying principle of a fire insurance contract is indemnity.

My intention, therefore, is to touch upon the value of such a clause as the Cash Value Clause and its necessity in a contract of fire insurance and to further explain briefly how a cash value of insured property is arrived at under varying conditions .

CONTRACT ONE OF INDEMNITY.

Insurance, it has been most aptly stated, is a contract of indemnity, whereby one party in consideration of a specified payment called the "premium" undertakes to guarantee another against risk of loss.

The processes in vogue in the United States are practically the same as in England, whence they are derived. In fact, there are still extant rules of sundry "guilds or social organizations of the Anglo Saxons whereby in return for certain fixed contributions, the members guaranteed each other against loss from fire, water, robbery or other calamity."

The Fire Insurance policy or contract of today is the covenant or "bond of indemnity" as between the insurer and insured, to protect him from loss by fire; and the printed conditions thereof are stipulations determining the rights and duties of both the insured

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and insurer, and determine the liability of the Insurance Company.

It is, moreover, a personal contract which insures an owner against loss on account of fire, but does not insure against fire, nor does it insure the goods themselves.

Fire Insurance, therefore, being a Contract of Indemnity, the value of the property destroyed, immediately before the fire, must be the limit of the assured's claim; and this doctrine is clearly set forth in the Limitation Clause embodied in the "Standard Policy" forms in use today.

Massachusetts, the first State to adopt by law a standard form of policy, was shortly followed by New York State, and subsequently by others.

In those States where no Standard form of policy is prescribed, that of New York State is generally used, being subject, however, in many cases to Statutory Provisions.

By reference to the New York Standard form of policy, lines 1 and 2, you will note the following provision:

This Company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with materials of like kind and quality.

This provision of the policy contract clearly limits the insured's recovery to an amount that will indemnify him for his loss without gain and expressly excludes remote or consequential damages, such as loss of profits, trade, rents or derangement of business or the payment of wages, even though in consequence of a fire, and the legal effect of this clause is to prevent the recovery of any damages that might occur by fire greater than that measured by the actual cash value of the property injured or destroyed. (*Osborne vs. Phenix Ins. Co. S. C. Utah*).

Without this limitation clause, the Fire Insurance policy would lose its significance as a contract of indemnity, and each and every risk would have to be specifically valued before the issuance of a policy, which would make the cost almost prohibitory.

In some States the wording of this provision of the Standard policy differs slightly from that of New York, but in effect they are similar, excepting, of course, those States which by Statutory provision or otherwise, have elected to make the policy a valued one.

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It is to be hoped that in the near future all States will adopt a uniform standard policy unrestricted by Statutory Provisions which are more or less detrimental to public policy.

"Actual Cash Value" is on occasion construed as equivalent to market value; but in general, means the sound value of property at the time of fire, or cost to an insured to replace damaged or destroyed property in the same condition as it was immediately preceding the fire, and is the hypothesis upon which all losses occurring under policies, where the valuation in the policy does not control, should be adjusted. It is the duty of an insurer to endeavor to agree with an insured on the cash value and measure of damage, as, otherwise, there is no authority for the appointment of appraisers to ascertain same. (*Boyle vs. Ins. Co.* 169 Pa. St. 349).

To arrive at the actual cash value, the Insurance Company is entitled to any depreciation, however caused, but nothing can be added to the cash value on account of estimated profits, in estimating the amount of loss.

Cost of replacement, while it limits the claim and may furnish a proper estimate upon which to base the amount of loss, is not in itself conclusive evidence of actual cash value at the time of fire, the basis of indemnity under a Fire Insurance policy being money value at the time of fire of property destroyed, not the cost of replacement, the insurer being at all times entitled to any depreciation that may exist. Where property is damaged by fire and there is a clause in the policy which permits an insurer to repair damages with "material of like kind and quality," nothing more than the cost of repairing can be recovered, and the difference between the actual cash value of such property at the time of fire and value in its damaged condition after the fire cannot be claimed as the measure of indemnity.

An Insurer always has a right to re-instatement or replacement of damaged or destroyed property, but the privilege is optional with the Company.

Buildings.

Actual cash value of an insured building is its value as it stood on the day of the fire. To determine such value the method usually adopted is to take into consideration the original cost, to which must be added the cost of any improvements subsequently made, and as the provision in the policy specifies, "what it would *then* cost the insured to replace," due allowance must be made for increase in cost of material or labor, should any exist. This is true also as to de-

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preciation, if any, and proper allowance must be made on account of same. The burden of proof in establishing depreciation, however, rests upon the Insurer.

In some instances appreciation on account of increase of price for material and labor is greater than the depreciation, as in the case of *Stenzel vs. Phila. Fire*, in which case the building insured originally cost \$8,061. Depreciation was estimated at 10%. Insured claimed an increase of cost of material and labor of 20%, valuing the property at time of fire at \$8,500. A total loss under the insurance was allowed by the Courts.

Depreciation may be proper on account of age or condition or it may be proper from other causes; "however caused" is the provision of the policy. A building may have been constructed for some particular purpose, but on account of failure of the enterprise, or unsuitable location, or subsequent change of trade centres, it could not be used for the purposes for which it had been erected, and had become, therefore, in a measure useless. The "actual cash value" in the event of fire, of such a building could not be determined upon an original cost, less depreciation for ordinary wear and tear, and neither could the measure of indemnity be based upon an estimate of the cost of replacement or repairing. Then, again, take the case of a dwelling house built in what was once an outlying section of a City. Subsequently, in consequence of a natural growth, a street was cut and a sewer built within a few feet of the building, making condemnation proceedings necessary, and which proceedings had been commenced prior to fire.

In such like cases the value of the building as it stood on the day of the fire, must be predicated upon commercial or intrinsic value, taking into consideration all the circumstances and facts surrounding the case.

It has been held that where a building stands on leased ground with a proviso in the lease to the effect that it must be removed at its expiration, or become the property of the owner of the land, and the lease has but a short time to run after the date of fire, that "intrinsic value only of the building" is the measure of indemnity.

When a building is located within the jurisdiction of a civil ordinance which calls for a shingle roof to be replaced with slate or other non-combustible material, or that fire-proof stairways must be provided and fire escapes, placed on a building, such increased cost in the event of fire is a proper charge to be taken into consideration in ascertaining actual cash value even though such improvements had

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not been made to the building before the fire, *provided* there be no stipulation in the policy excluding liability on account of such increase of cost as there is in the New York Standard Policy; but where there is a Statute nullifying such a policy provision such a charge would be proper.

VALUED POLICY.

As a general rule in States where a valued policy law prevails, and there is no question of fraud, misrepresentation or over valuation, the amount of insurance carried upon real estate constitutes the actual cash value, and in the event of a total loss is the measure of indemnity. In Wisconsin and Missouri this rule applies even though over valuation can be proven, and that it was knowingly too high when the insurance was taken out, and in the event of there being several policies on a building, the whole sum insured must be paid by each Company.

Where the insurer and insured have agreed beforehand as to the value of the thing insured, as might be in cases of insurance of profits, commissions or use and occupancy, in the absence of fraud or misrepresentation such valuation is probably conclusive evidence of money value and is to be taken as the measure of indemnity; but where pictures, bric-a-brac, or other valuable articles are insured specifically under a valued schedule, this is not necessarily so, as while the valuation named in the policy binds the Insurance Company, unless it is able to show fraud, the onus of proof that the property destroyed or damaged was actually the property described in the policy and upon which the valuation was based, remains upon the insured. For example, a person may purchase a painting for \$25,000, on the assumption that it was a Corot, and insures it as such under a valued policy for that amount. The painting is destroyed by fire, but it subsequently develops that it was not a Corot, but only a reproduction of one of Corot's paintings. The insured was perfectly innocent, and there had been no attempt at fraud, still he could only collect, if anything at all, an amount equivalent to the commercial value of reproduction of like nature as the one destroyed.

In the case of property specifically insured under a Schedule, without a qualifying clause in the form attached to the policy, expressly stipulating that the value stated shall be the agreed value of the property insured, the conditions of the policy prevail, the valuation named being but the limit of liability.

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PATTERNS.

Patterns, models, moulds, designs and other kindred articles used by manufacturers have no market value. Therefore, "market value" cannot be a basis of money value; neither does cost of reproduction always represent a basis for ascertaining the measure of indemnity, as they may not be worth reproduction, being what are known as "dead patterns." The cash value of such articles is sometimes arrived at upon a basis of reproduction, but is always an uncertain quantity, their value depending not only upon the condition they may be in at the time of fire, but also upon the uses to which they can be put.

The prudent Underwriter will see to it, when issuing insurance upon such class of property, that the amount of indemnity is at least limited in the policy to a specified sum.

PERSONAL PROPERTY.

In the case of personal property such as household furniture, wearing apparel, bedding, etc., the actual cash value at the time of fire is the market value of such property if there be one, otherwise, it is a fair valuation not to be determined by what the goods might bring at auction or at a forced sale or even what a second-hand dealer might offer for such property, but based upon original cost or cost of reproduction in like kind and quality, less a proper allowance for depreciation on account of age, condition, usage, etc. As was stated in *Grenier vs. Springfield S. C. La.* "the original cost price of movables, a large proportion of which had been in use for several years, falls somewhat short of establishing their value."

An insured is entitled to the actual cash value of his property at the time of a fire even though it cost him nothing.

If the damaged property is capable of repair, the measure of damage is the sum it will take to put it in the same or as good as the same condition as it was immediately before the fire.

MACHINERY AND FIXTURES.

The same would hold true as to machinery, fixtures, and such like articles, though should the property be damaged to such an extent as to be rendered worthless or beyond repair, then the cash market value of the cost to replace the destroyed property at the date and place of fire, less any difference there may be proven to exist as between the property new and its condition at the time of fire, would be the actual cash value and measure of indemnity, but

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this value of cost does not necessarily mean original cost, as the articles destroyed might be bought at the time of fire for less than original cost, or on the other hand, the cost at time of fire might be more. In either case, the Insurance Company or the assured is entitled to the benefit of such existing condition. This was held to be so in the recent case of *Gulf Compress Co. vs. Ins. Co. of Pa.* 129 Tenn. 586. A machine has been bought at a sacrifice sale for \$11,500 and insured for \$15,000. Total loss occurred. No evidence was produced to show that the machine could "then" (that is at the time of fire) nor, in fact, for several months after, have been procured for less than \$15,000. Depreciation was nil, as the machine was practically new. The Court decided loss was \$15,000.

MACHINERY MANUFACTURERS.

Where an insured is a manufacturer of machines, however, and machines manufactured by him are destroyed, the foregoing rule could not be applied, as conditions are entirely different, so except under very extraordinary circumstances, the actual cash value in such cases would be cost of reconstruction to the manufacturer at the time of fire, less depreciation on account of age, condition, usage, etc., and not the market value. This was so held in the case of *Standard Sewing Machine Co. vs. Royal Ins. Co.* 201 Pa. St. 645. The above rule would also hold good in the case of machines manufactured by an assured for economic or other purposes in his own work-shops for use in his own factory, damaged or destroyed on his premises. An interesting question is raised in this connection in the following manner:

A large manufacturer has several hundred thousand dollars worth of machinery, mostly purchased in the usual way from machine makers. They have, however, about \$50,000 worth which they have made themselves on the premises. These machines cost them to manufacture, including materials, labor and proper overhead charges, say \$170 each. If they had a certain fire and all of these machines were destroyed and they had to buy them in the market, they would cost them \$300 each. They ask at what figure should these particular machines be taken up in their inventory for the purpose of co-insurance, as they could not afford the time to rebuild the machines themselves. May on Insurance says "the measure of damages is neither the value of convenience nor of affection." The policy provision stipulates that the limit of the

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insurer's liability is what it would then cost the insured to replace with materials of like kind and quality less depreciation however caused.

It was held in the case of *Texas Moline Plow Co. vs. Niagara* 87 S. W. Rep. 192 that this proviso was not necessarily intended to mean immediate replacement, but within a reasonable time. In the case under consideration, either the time of fire or if that were momentarily impracticable on account say of the destruction of the machine shop, then so soon afterward as the machines could be reconstructed under similar conditions as they were originally constructed would be a reasonable time, as this mode of procedure was satisfactory to the insured at the time the insurance was effected, and replacement from other manufacturers would simply be a matter of convenience to him. To pay on a basis of \$300 would be to allow a gain to the manufacturer, which is contrary to the principle of indemnity and it is indemnity only that is guaranteed by the policy. In my opinion, therefore, the insured would only be entitled to recovery on a basis of \$170, a machine, less depreciation for age, condition, etc., the measure of indemnity being a sum equal to the actual cash value of the property destroyed on the day of the fire.

MACHINERY ON LEASE.

If machinery is held under lease with a proviso that at the end of the lease it is to be returned in good order and condition, and insurer had insured his "working interest" therein, the measure of indemnity is the value at the time of fire, of the property which he was bound to replace and not the value of the lease from the date of fire to expiration of same. (May).

GOODS IN THE HANDS OF MANUFACTURERS.

When staple products or commodities of prime necessity such as wheat, wool, cotton, sugar, etc., that are always in demand, and readily sold with practically no expense or trouble on what are known as "market quotations," are destroyed, the only way to effect restoration is by purchase in the open market, and the actual cash value, therefore, of such like commodities would be the market price ruling on the day of fire at the point where fire occurred, or if there be no market at that place, it would be proper to show what it was worth on that day in the nearest market, and such worth plus cost of transportation would be a fair criterion of actual cash value.

The policy defines the date of fire as the date at which the

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market value is to be taken, as it might happen that in the event of a serious conflagration the destruction of large quantities of commodities might cause the market price to greatly advance.

As a general rule, where goods are in the hands of a manufacturer, cost of production of the unfinished goods, without any allowance for profits, plus the value of the raw materials, would be the proper method of ascertaining actual cash value, as the payment of "Market Value" to a manufacturer would include the payment of an anticipated profit and be contrary to the principles of indemnity. Depreciation must be taken into consideration, as in many cases both finished stock and raw material may be old, out of fashion, or for other reasons would cause its "actual cash value" at the time of fire to fall far below its cost of production.

As exceptions to this rule, however, the Courts have held, in the cases of *Frick vs. United Fireman's Ins. Co.* 218 Pa. St. 409, and *Mechanics Ins. Co. vs. Hoover Distilling Co.* 40 Ins. L. J. 347, that the measure of damage and the liability of an Insurance Company under its policy to a manufacturer for the burning of a product like whiskey, "whose manufacture occupies much time and whose age constantly enhances its value, is not the cost of raw materials for and of the labor requisite to make new whiskey, but it is the cost of immediately replacing that product in the most inexpensive way by purchase, or otherwise, with a similar product of like kind and quality." In the case of *Hartford Fire Ins. Co. vs. Cannon* 19 Tex. Civ. App. 305, and *Mitchell vs. St. Paul German Ins. Co.* 92 Mich. 594, it was held that the cash value and place of fire; and in the case of *Mitchell et al. v. St. Paul German Fire Ins. Co.*, (1892) 1. L. J. XXI-1003, the Supreme Court of Michigan held that the proper measure of damages was the cash value upon the yards at the time of loss, and not the cost of manufacturing at their own mill, a like quantity of lumber from their own timber. This latter case, however, has been severely criticised as being unsound as to its decision.

Again, in *Phillips vs. Home Ins. Co.*, the Supreme Court of New York handed down a somewhat similar decision in the case of a manufacturer of straw hats.

A careful study of these cases, though, shows peculiar circumstances, and leads me to believe that they can be regarded as the exceptions that might be found to any rule. Take, for instance, the case of *Phillips vs. Home*, above mentioned, the insured was a manufacturer of straw hats. His plant was destroyed just prior

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to the opening of the straw hat season. It was claimed that he could not reproduce his stock before the season would be over, so the Court decided on that account that insured was entitled to receive market value of his stock and not merely cost of production. This undoubtedly included a manufacturer's profit, and to my mind caused the policy to lose its value as one of indemnity. It would be very interesting to know in what light this same Court would regard profit insurance, had this insured been carrying same. It is clearly apparent, however, the Courts are inclined to hold,

ERRATA FOR PAGE 92

Paragraph 3, commencing line 11, should read:

uct of like kind and quality." In the case of Hartford Fire Ins. Co. vs. Cannon 19 Tex. Civ. App. 305, and Mitchell vs. St. Paul German Ins. Co. 92 Mich. 594, it was held that cash value and measure of indemnity for lumber is the "market value" at the time and place of fire; and in the case of Mitchell et al. v. St. Paul German Fire Ins. Co., (1892) I. L. J. XXI-1003, the Supreme Court of Michigan held that the proper measure of damages was the cash value upon the yards at the time of loss, and not the cost of manufacturing at their own mill, a like quantity of lumber from their own timber. This latter case, however, has been severely criticised as being unsound as to its decision.

WHERE MANUFACTURED GOODS ARE DESTROYED

Where manufactured goods, or stocks of merchandise in the hands of dealers, are destroyed or damaged by fire, the actual cash value in such cases would be the "market value," or cash cost to the insured to replace his stock with goods of like kind and quality new on the day of the fire from the markets where such goods are usually manufactured or obtainable, less any difference there may be in value as between new and the condition of the destroyed stock at the time of fire, the insurer being entitled

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market value is to be taken, as it might happen that in the event of a serious conflagration the destruction of large quantities of commodities might cause the market price to greatly advance.

As a general rule, where goods are in the hands of a manufacturer, cost of production of the unfinished goods, without any allowance for profits, plus the value of the raw materials, would be the proper method of ascertaining actual cash value, as the payment of "Market Value" to a manufacturer would include the payment of an anticipated profit and be contrary to the principles

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A careful study of these cases, though, shows peculiar circumstances, and leads me to believe that they can be regarded as the exceptions that might be found to any rule. Take, for instance, the case of *Phillips vs. Home*, above mentioned, the insured was a manufacturer of straw hats. His plant was destroyed just prior

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to the opening of the straw hat season. It was claimed that he could not reproduce his stock before the season would be over, so the Court decided on that account that insured was entitled to receive market value of his stock and not merely cost of production. This undoubtedly included a manufacturer's profit, and to my mind caused the policy to lose its value as one of indemnity. It would be very interesting to know in what light this same Court would regard profit insurance, had this insured been carrying same. It is clearly apparent, however, the Courts are inclined to hold, at least as regards whiskey, lumber, sugar, and a few other staple products of a like nature in the hands of a manufacturer, that "actual cash value" means cost to insured to replace at the time of fire.

Where a manufacturer has sold his entire output or is under contract to manufacture and deliver a certain quantity of goods, and delivery is to be made within a stipulated period, in the event of fire occurring, destroying the goods, and thus obliging the insured to purchase similar goods from other manufacturers to carry out his contract, the cost of replacement in such cases must be taken as the cash value.

GOODS IN BOND.

Cash value of imported goods held in bond ought to be the imported value of such goods without duties, except in cases where the form on the policy specifically states that duties shall be considered as part of the value insured.

When distilled spirits, tobacco, and the like, are insured, and the *owner is liable* to the Government for the Internal Revenue Tax, the amount of such Tax is to be considered as part of the value insured.

The above subject is treated at length in another chapter.

MERCHANDISE DEALERS.

Where manufactured goods, or stocks of merchandise in the hands of dealers, are destroyed or damaged by fire, the actual cash value in such cases would be the "market value," or cash cost to the insured to replace his stock with goods of like kind and quality new on the day of the fire from the markets where such goods are usually manufactured or obtainable, less any difference there may be in value as between new and the condition of the destroyed stock at the time of fire, the insurer being entitled

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to proper allowances for any depreciation it can show has taken place in the stock on account of change of style, shop wear, handling, or for any other proper cause, but no allowance can be made on account of estimated profits, as profit is not something that inheres to merchandise, it being a merchant's compensation for his trouble and expense in seeking purchasers, and for the use of capital necessary for the carrying on of his business. Nor can any allowance be made on account of the presumptive profit on merchandise insured under the phrase "goods sold but not delivered or removed," which may be destroyed by fire while still in the hands of the vendor, and the cash value of such merchandise must be estimated on the market value at the time of fire, to the owner who is the vendor, as otherwise it would be allowing an insured to make two sales and realize two profits on one order, which procedure is estopped by the replacement clause in the policy contract.

While purchase price is often used as a basis for estimating the value of a stock of merchandise destroyed by fire, and books of accounts and invoices are admissible and properly acceptable in support of an insured's claim, they are not conclusive evidence of cash value at the time a fire occurs, as the insurer is always entitled to any depreciation which the goods may have suffered, however caused. It sometimes happens that an insured's books of account and invoices are destroyed by the fire, or it may be that he never kept any. Usually in such cases a statement is prepared by the insured from memory, showing the nature of his stock and the amounts paid for same, also his sales and profits, which statement when properly verified by original or duplicate invoices and/or the testimony of competent witnesses, such as persons experienced in selling or handling similar goods to those the insured sold, and who actually saw the destroyed stock just prior to the fire, can be taken as a basis for estimating cash value, but the burden of proof resting upon the insured, it is obligatory that he produce satisfactory evidence documentary, or otherwise, in substantiation of his claim. Memorized statements, however, are of uncertain quality and should always be accepted with a great deal of caution, as experience teaches us that in a great many instances, the claimant has a most wonderful memory as to the quantities, nature and cost of his goods, but a most lamentably poor one when it comes to when, where and of whom the goods were purchased.

To sum up, a policy of Fire Insurance is a contract of indem-

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nity, and when loss occurs thereunder, it must be given a construction which under ordinary circumstances and conditions will achieve the object of the parties making same, and the agreement is made that cash value shall be the limit of the insurer's liability, and cash value means the money value of the thing insured in its condition at the time of the fire, but in the event of an article being damaged only to the extent where it can be repaired, then the cost to the insured to repair is the limit of the insurer's liability.

VI

CONCEALMENT, MISREPRESENTATION, FRAUD OR FALSE SWEARING

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With respect to Concealment, Misrepresentation, Fraud or False Swearing, the Standard Policy provides:

This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss."

Concealment is defined generally in Bouvier's Law Dictionary as:

the improper suppression of any fact or circumstance by one of the parties to a contract from the other, which in justice ought to be known.

The general definition contained in the New Standard Dictionary as:

the injurious and intentional suppression or non-disclosure by a party to a contract (as of insurance) of facts that he was bound to know and reveal.

is, in fact, more nearly a definition of concealment in fire insurance. Neither of these definitions recognizes the distinction between concealment in marine insurance and concealment in fire insurance, a distinction embodying the vital element of intent.

Duer in his work on insurance, (Lect. XIII., P. I. Sec. 3), says of concealment in marine insurance:

It is not necessary, in order to avoid the policy, that the misrepresentation or concealment of material facts, shall appear to have been intentional and fraudulent. Whether it resulted from design, or from ignorance, mistake or inadvertence, the effect is the same.

But with respect to concealment in fire insurance, long before the adoption of the Standard Policy, Judge Bronson, writing for the New York Supreme Court, in *Burritt v. Saratoga Co. Mutual Fire Ins. Co.*, said:

In Marine insurance the misrepresentation or concealment by the assured of a fact material to the risk will avoid the policy, although no fraud was intended. It is no answer for the assured to say that the error or suppression was the result of mistake, accident, forgetfulness or inadvertence. It is enough that the insurer has been misled, and has thus been induced to enter into a contract which, upon correct and full information, he would either have declined or would have made upon different terms. Although no fraud was intended by the assured, it is

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nevertheless a fraud upon the underwriter, and avoids the policy. The assured is bound, although no inquiry be made, to disclose every fact within his knowledge which is material to the risk. But this doctrine cannot be applicable, at least not in its full extent, to policies against fire. If a man is content to insure my house without taking the trouble to inquire of what materials it is constructed, how it is situated in reference to other buildings, or to what use it is applied, he has no ground for complaint that the hazard proves to be greater than he had anticipated, unless I am chargeable with some misrepresentation concerning the nature or extent of the risk. It is therefore the practice of companies which insure against fire to make inquiries of the assured in some form, concerning all such matters as are deemed material to the risk, or which may affect the amount of premium to be paid. This is sometimes done by the conditions of insurance annexed to the policy, and sometimes by requiring the applicant to state particular facts in a written application for insurance.

5 HILL, 188, at 191.

May in his work on insurance, 4th Edn., Sec. 200, accordingly works out the rule that concealment in fire insurance is:

a positive intentional omission to state what the applicant knows, or must be presumed to know, ought to be stated.

And the courts, departing from the law of marine insurance, have now generally adopted the view that the concealment of a material fact, when not made the subject of express inquiry by the insurers, must be intentional to avoid the fire policy.

Reviewing the concealment clause of the New York Standard Policy, the late Justice Bischoff of New York adopting from a text writer, (5 Lawson's Rights, Remedies & Practice, Sec. 2,060, P. 3,520), the following statement:

Concealment is the wilful withholding of some facts material to the risk which the insurer had a right to know, and which the insured was under a duty to disclose.

held, in a case where the failure to disclose a chattel mortgage was urged as a concealment avoiding the policy, that:

Plaintiff, and its officers and agents, cannot be said to have wilfully withheld any material fact from defendant's knowledge unless they knew, or had reason to know, that the information was required by it. There is nothing before us from which we may ascertain that the application for insurance required that the liens or incumbrances be stated, or that inquiry was at any time, before the policy was issued, made of plaintiff, its officers or agents, respecting these matters, and in the absence of every intimation that such was desired, plaintiff was under no duty to disclose the particulars of its interest in the property insured.

AM. ART. GOLD S. CO. v. GLENS FALLS INS. CO.,
1 Misc. 114.

although the court did find that the chattel mortgage constituted a breach of the warranty against the existence of a chattel mortgage which would avoid the insurance upon the property encumbered.

Vermont, borrowing from New Hampshire, (Clark v. Union Mutual Ins. Co., 40 N. H. 333), defines concealment under the standard policy provision as:

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a designed and intentional withholding of any fact material to the risk, which the insured ought in honesty and good faith to communicate.

MASCOTT v. FIRST NATIONAL F. I. CO.,
69 Vt. 116.

The general attitude of the courts toward concealment in fire insurance is expressed in the often quoted case of *Gates v. Madison County Mutual Ins. Co.*, 5 N. Y. 469, where Judge Jewett, writing for our Court of Appeals, said:

A policy of insurance is a contract, and is to be governed by the same principles which govern other contracts. When it is said to be a contract *uberrimae fidei*, this only means that the good faith, which is the basis of all contracts, is more especially required in that species of contract in which one of the parties is supposed to be necessarily less acquainted with the details of the subject of the contract than the other. But either party may be innocently silent as to grounds open to both, to exercise their judgment upon, for in such a case the maxim, *aliud est celare, aliud tacere*, applies.

In marine insurance, the insured is bound, although no inquiry be made, to disclose every fact material to the risk, within his knowledge. And although the same general principles apply to the contract of fire insurance, yet in making the latter, there being no fraud practiced, if the applicant for such insurance make a true and full answer to the questions put to him by the insurer, in respect to the subject of insurance, it is enough; he is not answerable for an omission to mention the existence of other facts, about which no inquiry is made of him, though they may turn out to be material for the insurer to know in taking the risk. He has a right to suppose that the insurer in making inquiries in respect to particular facts, deems all others to be immaterial to the risk to be taken, or that he takes upon himself the knowledge, or waives information, of them.

And so if an insurer enter into a contract of insurance against fire, without making any inquiry of the applicant in respect to the subject of insurance, he has no ground for complaint, if the risk turn out to be greater than he anticipated, unless, indeed, the insured is chargeable with some misrepresentation in reference to the nature or extent of the risk.

Hence it has become the general practice of insurers against fire, to guard in some form against the consequence of such matters as they deem material to the risk, or which may affect the amount of premium to be paid; sometimes by conditions or proposals annexed to and made a part of the policy, and sometimes by requiring the applicant to disclose certain facts in a written application for insurance making it a part of the contract. Experience has, as I think, shown that the provisions thus adopted have proved generally sufficiently strict and technical to insure a full and true disclosure of all such facts as insurers have thought it important to know; and where the insured has complied with such provisions, I see no ground to make him responsible, as for a concealment, by omitting to communicate to the insurer other facts and circumstances within his knowledge of ordinary occurrence, although material to the risk, unless they have been withheld with an intention to defraud, there being no condition in the policy requiring it."

An important qualification is added to the general rule by the judge who wrote for the Ohio Supreme Court this statement:

in the absence of special provisions in the policy relating to the disclosure of facts material to the risk, all that is required of the insured is, that he shall not misrepresent or designedly conceal any such facts, and

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that he answer fully and in good faith, all inquiries addressed to him by the insurer * * * perhaps with the qualification * * * that the insured does not withhold information of such unusual and extraordinary circumstances of peril to the property, as could not, with reasonable diligence, be discovered by the insurer, or reasonably anticipated by him, as a foundation for specific inquiries.

PROTECTION INS. CO. v. HARMER,
2 Ohio St., 452, at 473.

This qualification, important to underwriters in New York who are constantly binding fire risks in remote sections of the country, was recognized in New York by the Appellate Division in the Fourth Department in the case of *Clarkson v. Western Assurance Co.*, 33 Ap. Div. 23, involving the steamer *Northerner*, which was engaged in traffic on the Great Lakes. In December the vessel on voyage from Buffalo to Duluth was stranded at Keweenaw Point on Lake Superior. To get her off about 2,500 barrels of kerosene oil were jettisoned and a large number of barrels of lubricating oil were broken and poured over the side of the vessel, so that the vessel must have been saturated with oil, and the risk from fire materially increased. The vessel so lightened, but leaking badly, made a near-by harbor. The captain by wire advised the owners at Rochester, N. Y., of her situation and that she would lay up for the winter, suggesting that they should obtain their fire insurance for the winter. The owners by wire directed their broker at Buffalo to obtain the insurance, and he did so without disclosing to the underwriters the facts as to the saturation of the vessel by oil and in fact without himself knowing them. The court held that:

The subject of insurance was a vessel which was laid up in a harbor many hundreds of miles distant from the place where the insurance was effected. It was consequently not 'within the limits of actual inspection by the insurers or their agents.' In accepting an application for insurance under these circumstances the underwriters had a right to assume that the owners or their agent would act in perfect good faith and disclose any and all facts material to the risk of which they had any knowledge; and it seems to us that they were under precisely the same obligation to do so as they would have been had they been seeking to obtain an insurance of their vessel against the perils of water. * * * Consequently, to have concealed from them its true condition was, in our opinion, almost if not quite equivalent to an actual fraud. and a judgment against the underwriters was reversed.

In deciding what is a "conscious," "wilful," "designed" or "intentional" withholding, the courts, as is usual in the law of fire insurance, tend to favor the insured; so it has been held that a general statement of the facts, if enough to put the underwriter on guard, does not require the applicant to go into details. On Wednesday evening, Bebee, a Connecticut Yankee, discovered and extinguished fire in a barrel of shavings in his woodhouse. Thursday

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afternoon he discovered fire in the attic of the woodhouse and at the same time in a separate room in the attic of his dwelling house connecting. By the time he had extinguished those two fires another fire was discovered in a front chamber of the dwelling, and he extinguished that fire, making four fires of unknown and suspicious origin within twenty-four hours. Bright and early Friday morning, Bebee went to the fire insurance agent to get insured. Bebee told the agent he had had some fires and had put them out, that he was afraid of fire and wanted to know whether certain kinds of matches left about the house would ignite of themselves. He did not specify that he had had four fires on his premises within the forty-eight hours preceding the application. The agent asked if Bebee knew the origin of the fires and whether he had any enemy whom he suspected. Receiving negative answers the agent remarked that he himself carried insurance because he was afraid of fires which frequently occurred without anyone knowing how, accepted the line and hastened to collect his commission. The house burned on the Tuesday following. The Supreme Court of Connecticut, *Beebe v. Hartford County Mutual*, 25 Conn., 51, held that the frequent occurrence of fires shortly before the insurance was effected was a material circumstance, the concealment of which would have avoided the policy, but that Bebee's general statement was enough to put the underwriter on his guard and was sufficient, and the insured was not required to go into details, the court saying: the insured is not bound to force his knowledge upon the insurer.

If, however, the underwriter has notice that the insured has omitted to give some information which it deems material, as the omission to answer a question in the application it will not be heard, after the policy has issued and a loss has been incurred, to complain of the concealment, for the reason that the issue of the policy before it has the desired information is a waiver thereof. An illustration is found in New York in the case of *Parker v. Otsego Co. F. I. Co.*, 47 App. Div. 204, aff'd. 168 N. Y. 655, where the insurance was issued upon a written application containing the following:

The aforesaid premises are not encumbered by mortgage, or otherwise, to exceed the sum of \$_____.

It did not appear whether the application was on a company form or assured's form. The court held that if assured had written the entire application it was a statement that there was an encumbrance of uncertain, unknown or unstated amount; but if the form was prepared by the underwriter and the assured left the amount blank, then the statement was merely incomplete, and obviously so to the

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underwriter and that there was no concealment surviving the issue of the policy.

To the same effect, see *Carson v. Jersey City Ins. Co.*, 43 N. J. L. 300; *Hall v. People's Mutual*, 72 Mass. 185, and *Armenia Ins. Co., v. Paul*, 91 Pa. St. 520.

The test of the materiality of any fact is not whether or not the fact has contributed to the occurrence of a loss. In point of time, the application of the test must be as of the inception of the contract, not after the loss.

A material fact is defined to be:

one which if communicated to the underwriter would induce him either to decline the risk altogether, or not to accept it unless at a higher premium.

BOGGS v. AMERICA INS. CO.,
30 Mo. 63.

or one:

the knowledge or ignorance of which would materially influence the insurer in making the contract at all, or in estimating the degree and character of the risk, or in fixing the rate of insurance.

MASCOTT v. FIRST NAT'L F. INS. CO.
69 Vt. 116.

holding that in the absence of inquiry on the part of the insurer, failure on the part of the insured to disclose a mortgage of \$200. on a building worth \$2,500. was not a material concealment.

Following the *Gates* case, *supra*, the courts have generally held that if the underwriter fails to make any inquiry at the time the policy is issued, it must be deemed content to assume the risks of the property as they are; but if the underwriter does make inquiry, then those matters not inquired about are deemed immaterial. So the Court of Appeals in New York has said:

The applicant has a right to suppose that the insurer, in making inquiries as to particular facts, considers all others to be immaterial, or that he assumes to know or waives information in regard to them.

BROWNING v. HOME INS. CO.
71 N. Y. 509.

In *Smith v. Home Ins. Co.*, 47 Hun. 30, it appeared by the evidence that Smith made complaint against a person who was thereafter convicted of a crime. The father of the convict then threatened to "fix" Smith. Friends advised Smith to get his property insured. He did. And in due course a fire occurred. The trial court was requested and declined to charge:

that if the plaintiff believed, when he applied for the policy, that there was danger of an incendiary burning of his property, and did not disclose that fact in his written application, he could not recover.

The Appellate Court said:

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It does not appear that any threat to burn the plaintiff's property or to do him any injury was made, other than that imported by the purpose expressed to fix him. This did not necessarily increase the hazard of the insurance of the plaintiff's buildings, but inasmuch as he deemed it prudent, by reason of such threat to protect himself in that manner against loss, it is said that the information that the threat to fix him was made must be deemed material to the risk. Assuming it was so, the plaintiff was not called upon by any inquiry embraced in the application to make the disclosure of it. And the application in blank was provided by the defendant's agent to be filled by answers to questions it contained, to furnish the basis of the insurance. He was not required to insert it in the application, and, therefore, the exception to the refusal to charge as requested in that respect was not well taken.

The case is complicated by testimony that assured related the circumstances to a solicitor who was claimed to be in the employ of the underwriter's agent, but the court said, however, that it did not rest its decision upon that ground, but upon the ground that it could not, as matter of law, properly hold that there was a designed concealment inasmuch as the application blank submitted by the underwriter contained no inquiry respecting incendiarism.

There is a statement in a Kentucky case, *German American Ins. Co. v. Norris*, 100 Ky. 29, containing the provisions of the standard policy, that an applicant for fire insurance on property is not bound to disclose an attempt to burn the property sought to be insured unless asked about it. In this case, as in the *Smith* case, *supra*, in New York, there was some evidence that the underwriters knew the facts when accepting the insurance, and I do not consider them authorities entitled to great weight for the proposition that one may procure insurance on his property because of known threats to burn it, conceal the threats from the underwriters and after the anticipated loss collect the insurance.

It was squarely held in Louisiana that the omission to notify the underwriter of a recent attempt to burn a building next to that on which the insurance was sought—a circumstance which prompted the purchase of the insurance—avoids the insurance.

WALDEN v. LOUISIANA INS. CO.

12 Louis. 134,
32 Am. Dec. 116.

But Arkansas has held, and we are not disposed to quarrel with the decision, that if the suspected incendiaries are dead, a negative answer to the question, "Has any threat of incendiarism been made, or have you any fear of incendiarism?" will not avoid the insurance.

ARKANSAS MUT. FIRE INS. CO. v. WOOLVERTON,

82 Ark. 476.

In the case of *Orient Ins. Co. v. Peiser*, 91 Ill. App. 278, there was testimony that insured's brokers presented an application at

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five o'clock, P. M., for insurance, which was accepted; that a fire had broken out in the neighborhood of the insured property between 4 and 4:20 o'clock, P. M.; that the brokers knew of the fire at 4:45 o'clock but did not know that it had reached their client's property and that they did not communicate their knowledge of the circumstances to the underwriters. The court held that if there was a fire raging in the neighborhood of the building containing the insured property at the time the application was made and the applicant knew of it when he made the application and suppressed that fact, the contract of insurance could not be enforced because of fraud.

It was decided in 1914 in *Wood v. Spring Garden Ins. Co.*, 215 Fed. 355, that if an insurance agent issues a policy on his own property and does not disclose to his company the facts as to his interest and ownership, the policy is void. In *Mississippi in Wildberger v. Hartford Fire Ins. Co.*, 72 Miss. 338, the rule was applied to a policy upon property held by the agent, not as an individual, but as receiver appointed by the courts.

Ordinarily, whether or not any fact is material is for the jury to determine. So, in *Pelzer v. Sun Fire Office*, 36 S. C., 213, under an instruction that the insured in applying for the insurance should not withhold any fact which they knew, or had reason to believe, would be likely to influence the underwriters either in fixing the rate of premium or in rejecting the risk altogether, it was left to the jury to determine whether the concealment was material when insured failed to disclose to the underwriters the provisions of a lease releasing insured's landlord, a railroad company, from liability for any loss by reason of fire communicated from its locomotives, thereby defeating the underwriters' rights of subrogation. The jury decided that the underwriters would not have rejected the risk or raised the rate had they known of the release and their finding was sustained on appeal.

In a late case in Ohio, *Ensel v. Lumber Ins. Co.* 102 N. E. 955, decided in 1913, the insurance covering insured's interest in lumber taken from an elevator purchased from a railroad for the purpose of demolition, it was held that the failure of the insured to direct the attention of the underwriters to a clause in their contract with the railroad releasing it from liability for fire caused by it did not even raise a question worthy of submission to the jury, and the

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trial court properly refused to submit it to the jury when the underwriter's agent could have seen the contract for the asking but did not ask.

In passing, it may be observed that these last two cases should not be confused with those cases where the insurance contract contains an express provision relieving the underwriters from liability in case of any agreement by the insured releasing his rights of recovery against third persons or corporations, for the courts have sustained the validity of those provisions and released the underwriters. See *Fayerweather v. Phenix Ins. Co.*, 118 N. Y. 324; *Kennedy Bros. v. Iowa State Ins. Co.*, 119 Iowa 29, and *Carstairs v. Mechanics & T. I. Co.*, 18 Fed. 473.

The word representation is defined generally in Webster's International Dictionary as:

A statement of fact incidental or collateral to a contract, made orally or in writing or by implication, on the faith of which the contract is entered into.

Representation in insurance law is defined by the New Standard Dictionary as:

A statement of facts affecting the risk made by an insured person prior to the execution of the policy. Such representation, though extrinsic to the policy, is held as collateral thereto.

A misrepresentation is by those dictionaries said to be:

A wrong or false representation; an incorrect, unfair, or false statement.

An untrue, improper or unfaithful representation.

Bouvier's Law Dictionary, Rawle's Revision, defines representation in insurance as:

The stating of facts by either of the parties to a policy of insurance, to the other, whether in writing or orally, expressly or by plain implication, preliminary and in reference to making the insurance, obviously tending to influence the other as to entering into the contract.

The same authority says:

Misrepresentation is the statement made by a party that a thing is in fact in a particular way, when it is not so.

The distinction between a concealment and a misrepresentation is that the former arises out of a silence where there is a duty to speak, and the latter is an incorrect speech: concealment, at least in the modern law of fire insurance, must be conscious, wilful, designed, intentional; whereas, misrepresentation occurring either purposely or through negligence, mistake, inadvertence or oversight, will avoid the insurance, the courts holding that in either case the injury to the underwriter is the same.

The distinction between a representation and a warranty is that a warranty is a part of the contract and must be strictly complied

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with; whereas, a representation is but a statement incidental to the contract, precedes it, is the inducement to it and need be only substantially true. However, by lines 45 and 46 of the standard policy providing:

If an application, survey, plan, or description of property be referred to in this policy it shall be a part of this contract and a warranty by the insured.

the contents of those documents, although not endorsed upon, or annexed to, the policy, are made warranties and with respect to them our Appellate Division has said:

We think it well settled in this State that where, by the terms of a contract of insurance, the application is made a part of the policy, answers made to specific questions in the application are deemed warranties, and, if untrue, prevent a recovery on the policy.

In such a case the statements contained in the application are made material by the contract.

KING v. TIOGA CO. ASSN.,
35 App. Div. 58.

holding that an answer "no," to a question in the application "Is it encumbered" and shown to be false, avoided the insurance as to the real estate encumbered, although a recovery was allowed, on the theory of the divisibility of the contract, on personal property described in a separate item of the policy.

Concealments and misrepresentations are usually said to take place at or before the issue of the policy, but they may occur at or before the making of some endorsement on the policy, at least, with respect to the new matter introduced into the contract by the endorsement. It is probable that the effect upon the entire contract of concealments or misrepresentations in connection with the procuring of endorsements will vary with the nature of the endorsements and the relation of the concealments or misrepresentations to the whole insurance.

It is doubtful whether one, procuring an endorsement which only modifies some term of the existing contract without making a new contract by increasing the risk or introducing a new party as insured, would be required to disclose facts arising subsequent to the issue of the original policy and not relating especially to the new matter introduced by the endorsement, even though concealment of such facts upon procuring new insurance would be fatal.

Representations may be affirmative or promissory; affirmative if relating to the existence of a particular state of things at the time the contract is made and becomes operative, promissory if relating to what is to happen during the life of the contract. Under the rule excluding parole evidence to vary the terms of a written instrument,

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proof may not be made of an oral promissory representation as it is deemed to be merged in the written contract, but May in his work on insurance, Sec. 182, fourth edition, says that it may be shown if made in bad faith with the intent to mislead and deceive and amounting to fraud. If an affirmative representation be true when made and the contract entered into, a change subsequent to the issue of the contract will not avoid the contract, unless the change amounts to a breach of some warranty contained in the policy.

In May on Insurance, Sec. 190, p. 385, 4th edn., it is said:

A representation is a continuous statement from the time it is made during the progress of the negotiations, and down to the time of the completion of the contract; so that though in point of fact the representation be true when actually made, yet if by some change intervening between that time and the time of completion of the contract it then becomes untrue, it will avoid the contract, if the changes be material and to the prejudice of the insurer, or be such as might probably influence their opinion as to the advisability of accepting the risk. The law regards it as made at the time the contract is entered into. And the same rule applies in case of concealment.

Citing this statement, it was held in *Carleton v. Patron's Androscoggin F. I. Co.*, 109 Maine 79, where the applicant represented that other insurance would expire on a designated date, which was before the acceptance of the application, and thereafter and before the acceptance of the application he procured other insurance without the knowledge of the underwriter, the representation was not true at the time of the acceptance of the application, and the policy was invalid.

But a contrary view is taken in some States, as in Iowa, *Day v. Hawkeye*, 72 Iowa 597, where foreclosure proceedings were commenced between the making of the application and the issue of the policy, the court holding that the representation was true when made, that by the language of the policy the warranty contained therein applied not to the pendency but to the commencement of foreclosure proceedings after issue of the policy, and that the period between the making of the representation and the acceptance of the line was covered neither by the representation in the application nor the warranty in the policy.

To be material, the misrepresentation must be in respect to an ascertainable fact, as distinguished from a mere matter of opinion, judgment, probability, or expectation; if it is vague or indefinite in its nature and terms, or is merely a loose, conjectural or exaggerated statement, it is not a material misrepresentation.

So in Maine it is held, *Dennison v. Thomaston Mutual Ins. Co.*, 20 Maine 125:

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But opinions, if honestly entertained, and honestly communicated, are not misrepresentations, however erroneous they may prove to be in a case where the insured, in response to a written interrogatory as to the distance from other buildings, has said "each side of the block are small one-story wood sheds, and would not endanger the building if they should burn," although the fire actually did spread from the sheds to the building insured, but the court intimated that its ruling would be otherwise if the opinion were not uttered in good faith.

A misrepresentation of value may be merely a matter of opinion which will not avoid the insurance, but a misrepresentation of cost or amount paid is a misrepresentation of fact which will avoid the policy as in *Dunham v. Citizens Ins. Co.*, 34 Wash. 205, where assured made an oral statement in response to inquiry by the agent that he had paid \$1,500 on the contract price of a building under construction, whereas, in fact he had paid only \$700, and the insurance was held to be void.

Or as in *Craddock v. Connecticut Fire Ins. Co.*, 160 Ky., 519, where the insured, in an application for insurance on machinery stated that it cost \$1,200 and had only been in use two years, whereas it had cost only \$250 and had been in use more than seven and the misrepresentation was held material and sufficient to defeat a recovery on the policy after a fire.

In contrast with the rule respecting concealments, particularly as illustrated in the *Beebe* case, *supra*, it was held that the insured was chargeable with misrepresentation sufficient to avoid the insurance, when, in response to the underwriter's direct interrogatories respecting danger from incendiarism, the insured, a manufacturer, talked generally with the agent about the constant danger of fire from discharged employees, but did not mention a small fire of recent occurrence which, he believed, had been set on his premises by a discharged workman. And it made no difference, the court held, that the jury believed assured's statement that when he applied for the insurance he believed the danger from the previous incendiary past.

NORTH AMERICAN FIRE INS. CO. v. THROOP,
22 Mich. 146,

the court saying:

it cannot be denied that an attempt to destroy by fire the property upon which insurance is sought, is usually regarded as a circumstance of very high importance, and as one that presumptively is always material to the risk. * * * No one can question its being both proper and prudent for the insurer in his application for policies to treat this circumstance as material, and to require specific and truthful answers concern-

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ing it; and when he has done so, and made their truthfulness a condition of the contract, we do not think it competent to submit to a jury the question of materiality, and allow them to find, in opposition to the contract of the parties and to general experience, that it was unimportant. We think a fact thus specifically inquired about, and generally of such vital importance, to be considered material as a matter of law. * * * The plaintiff's general talk about a fear of the building being burned was precisely of that character to be well calculated to lead the agent away from any supposition that this particular building had been, or was likely to be singled out from others in the same city for destruction; and his answer to the interrogatory in the application, if not untruthful, was at least wanting in candor and frankness, and had a tendency to mislead. When a person is particularly interrogated regarding a subject peculiarly within his own knowledge, and the other party is expected to contract with him in reliance upon his answer, and the answer is made misleading if not untruthful, it seems to us a perversion alike of law and justice to say that he shall have the advantage of his uncandid answers if he can convince a jury, that the other party was wanting in prudence in relying upon them, because of having notice extrinsic of these answers, which was sufficient, if followed up by inquiries in other quarters, to have led him to a knowledge of the exact facts.

A material misrepresentation by the agent for effecting the insurance will defeat it, though not known to the assured, and though made without any fraudulent intent on the part of the agent, to the same extent as though made by the insured himself.

ARMOUR v. TRANSATLANTIC F. I. CO.,
90 N. Y. 450.

CARPENTER v. AM. INS. CO.,
1 Story's C. C. 57.

In the Armour case, insured's agent, on applying for insurance, stated that there was \$200,000 of insurance on the property, whereas, there was in fact only \$30,000. Apparently the policy did not contain a co-insurance clause and the underwriter's risk on the policy was greatly enhanced because the total contributing insurance was so small in amount. Our Court of Appeals held that while the materiality of any representation is usually for the jury to determine, the risk was so much greater than it would have been had the representation as to other insurance been true that a verdict that the representation was immaterial would have been set aside.

In Wells v. Glens Falls Ins. Co., 117 App. Div. 346, it appeared that the husband, who managed the place for the wife in whom title was vested, sometime prior to application for the insurance, told her of incendiary fires and named the incendiary. He presented to her an application for insurance containing the question "Have you any reason to fear incendiarism?" and a negative answer thereto, which she signed. The Appellate Division held that:

Whether the plaintiff had reason to fear incendiarism was a material inquiry. If she had reason for such fear she had falsely answered an important question, had given the defendant inaccurate information, and her policy was unenforceable.

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If the application be filled out, either incorrectly or insufficiently, for the insured by the underwriter's agent with full knowledge of the facts, or if the applicant's answers to questions be set down incorrectly or insufficiently, and the application be then signed by applicant without noticing the errors, parole testimony will be admitted to prove the true statements.

PHENIX INS. CO. v. STOCKS,
149 Ill. 319.

It has been held that the policy is not avoided by a misrepresentation as to the location of property if the underwriter knows the actual facts, the courts ruling that the issuing of a void policy and retaining of a premium therefore amounts to fraud on the part of the underwriter. In *LeGendre v. Scottish U. & N. I. Co.*, 95 App. Div. 562, the application stated that the premises were on the south side of the road, whereas they were on the north side. Our Appellate Division in the first Department said:

It does not appear that the defendant made any investigation * * * and if it had investigated it would have discovered the true location of the plaintiff's residence. Had it been done within a reasonable time and there had been any basis for claiming it had been misled to its prejudice, it might have rescinded the contract and returned the premium; but having retained the premium until after the fire, it should not be heard to say that no property was insured.

Following this case the Appellate Division, in the Second Department, held, in *Curnen v. Law, Union and Rock Ins. Co.*, 159 App. Div. 493, that a misdescription of the location of a dwelling in a fire insurance policy upon household goods, by designating it as at the northwest corner of an intersection of two streets, instead of as at the northeast corner of the intersection of the same streets, does not render the policy void, where there was no other building at the street intersection, although the company, in reliance thereon, took another risk upon the dwelling, the two combined risks exceeding the limit allowed to local agents on such lines, as the true location could have been discovered upon investigation, and the excess could have been reinsured.

The Court, Justice Harrington Putnam writing, referred to the fact that fire insurance offices have local maps which show location of property and approved the decision of the Appellate Term in the Second Department in *DeNoyelles v. Del. Ins. Co.*, 78 Misc. 649, where it was expressly held that the company was charged with knowledge of facts which its local agents had in the maps and cards in their offices.

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An example of material misrepresentation of the nature of the risk is found in the case of *Evans v. Columbia F. Ins. Co.*, 40 Misc. 316, where the late Justice Gaynor held it a good defence to an action on a fire insurance policy purporting to insure all of plaintiff's cotton presses throughout the United States, that the plaintiff represented to the underwriter that it had only 150 such presses, whereas in fact it had 700 and that only a few of them were in couples, whereas substantially all were in couples; the court believing that the number of presses and their proximity to each other affected the risk and were material.

Fraud is a more inclusive term than the other terms under consideration in this paper. It may arise out of a concealment, or a misrepresentation, or false swearing, it may include all of them, or it may exist in some other form. It may exist at any time, either before the issue of the policy, during the term thereof, or after a loss. Fraud, whenever it is established, avoids the contract *ab initio*. It has been held that the underwriter may contest the valuation stated in a valued policy, if it is the result of fraud.

It is defined by Webster's International Directory as:

An intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him, or to surrender a legal right; a false representation of a matter of fact (whether by words or conduct, by false or misleading allegations, or by concealment of that which should have been disclosed) which deceives and is intended to deceive another so that he shall act upon it to his legal injury.

The means by which deceit is practiced; an artifice by which the right or interest of another is injured; an injurious stratagem; a deceptive device; a trick."

The New Standard definition of fraud in law is:

Any artifice or deception practiced to cheat, deceive, or circumvent another to his injury.

As the purpose of a fraud is to enable an insured to collect from his underwriter a sum not due at all, or one larger than is actually due, on the policy, it is usually, but not necessarily, coupled with false swearing either in the proof of loss or the examination under oath, or both, as to assured's knowledge of the origin of the fire, or as to the quantity of personal property in his premises at the time of fire, exaggeration of value of the destroyed property, depreciation of the value of the salvage or removal and concealment thereof, his interest in the subject of insurance or the encumbrances thereon, or alterations in his books or otherwise.

It is often said, particularly in insurance litigations, that "the law abhors a forfeiture." It is also said that the penalty (forfeiture

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of the insurance) for false swearing bears no relation either to the benefit the insured secures or the injury which he imposes on the underwriter. So it is said that the penalty is not to fall unless the false swearing is knowingly and wilfully done; but the rule in the Federal Courts is, that if there be false swearing knowingly and wilfully done with respect to material facts, an intention to deceive the underwriter will be presumed therefrom.

In *Claffin v. Commonwealth Ins. Co.*, 110 U. S. 81, assured in his examination under oath swore falsely as to value and as to his ownership of the goods. He then claimed that his false swearing was not for the purpose of deceiving the underwriters, but to substantiate statements to the same effect previously made to R. G. Dun & Co. for the purpose of obtaining commercial credit. The United States Supreme Court said:

The object of the provision in the policies of insurance, requiring the assured to submit himself to an examination under oath, to be reduced to writing, was to enable the company to possess itself of all knowledge, and of all information as to other sources and means of knowledge, in regard to the facts, material to the rights, to enable them to decide upon their obligations, and to protect them against false claims. And every interrogatory that was relevant and pertinent in such an examination was material, in the sense that a true answer to it was of the substance of the obligation of the assured. A false answer as to any matter of fact material to the inquiry, knowingly and wilfully made, with intent to deceive the insurer, would be fraudulent. If it accomplished its result, it would be a fraud effected; if it failed, it would be a fraud attempted. And if the matter were material and the statement false, to the knowledge of the party making it, and wilfully made, the intention to deceive the insurer would be necessarily implied, for the law presumes every man to intend the natural consequences of his acts. No one can be permitted to say, in respect to his own statements upon a material matter, that he did not expect to be believed; and if they are knowingly false, and wilfully made, the fact that they are material is proof of an attempted fraud, because their materiality, in the eye of the law, consists in their tendency to influence the conduct of the party who has an interest in them, and to whom they are addressed. * * * The fact whether Murphy had an insurable interest in the merchandise covered by the policy was directly in issue between the parties. By the terms of the contract he was bound to answer truly every question put to him that was relevant to that inquiry. His answer to every question pertinent to that point was material, and made so by the contract, and because it was material as evidence; so that every false statement on that subject, knowingly made, was intended to deceive and was fraudulent.

And it does not detract from this conclusion to suppose that the purpose of Murphy in making these false statements was not to deceive and defraud the companies, as is stated in the bill of exceptions and certificate, but for the purpose of preventing an exposure of the false statement previously made to the commercial agency in order to enhance his credit. The meaning of that we take to be simply this: that his motive for repeating the false statements to the insurance companies was to protect his own reputation for veracity, and that he would not have made them but for that cause. But what is that but that he was

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induced to make statements, known to be false, intended to deceive the insurance companies, lest they might discover, and others through them, the falsity of his previous statements; in other words, that he attempted, by means of a fraud upon the companies, to protect his reputation and credit? In any view, there was a fraud attempted upon the insurers; and it is not lessened because the motive that induced it was something in addition to the possible injury to them that it might work. The supposition proceeds upon the very ground of the false statement of a material matter, knowing and wilfully made, with the intent to deceive the defendants in error; and it is no palliation of the fraud that Murphy did not mean thereby to prejudice them, but merely to promote his own personal interest in a matter not involved in the contract with them. By that contract the companies were entitled to know from him all the circumstances of his purchase of the property insured, including the amount of the price paid and in what manner payment was made; and false statements, wilfully made under oath, intended to conceal the truth on these points, constituted an attempted fraud by false swearing which was a breach of the conditions of the policy, and constituted a bar to the recovery of the insurance.

Many of the State Courts follow the Federal Courts that a presumption of intent to deceive arises from false swearing knowingly and intentionally done. So in Maine, it is said:

False swearing is fraud. False swearing consists in knowingly and intentionally stating upon oath what is not true. A false statement intentionally and knowingly, or fraudulently made, certainly constitutes fraud, and the statement of a fact as true which a party does not know to be true, and which he has no reasonable ground for believing to be true, is fraudulent. * * *

Where a clause like the one mentioned is contained in the policy, and the insured knowingly and purposely makes a false statement on oath, concerning the subject matter, it vitiates the policy and bars his right of recovery, whether his purpose was to deceive the company or not, for it is 'so nominated in the bond.'

Tinscott v. Orient Ins. Co., 88 Maine 497.

And in Oregon in *Willis v. Horticultural F. R. of O.*, 137 Pac. 761, in a case where the insured had included in his proof of loss as totally destroyed articles which he himself had saved from the fire, the court said:

The terms 'fraud' and 'false swearing,' being used together, must have the same application, and the false swearing must have been knowingly and wilfully false; its effect being to deceive or mislead.

but that

false swearing knowingly and intentionally done is evidence of the fraud and of the intention to injure,

the underwriter and that because thereof the assured

should lose his standing in a court of justice as to any claim under that policy.

Some States have adopted a rule expressed by the Wisconsin court thus:

It is not enough that it occurs through mistake, carelessness, or inadvertence, or even in unreasonable reliance on information derived from others.

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BEYER v. ST. PAUL F. & M. INS. CO.,
112 Wis. 138.

So in *Ins. Co. v. Scales*, 101 Tenn. 628, title to insured property was in two sisters, who took no active part in the business, knew personally little of it, but left the management to their husbands. Proofs were prepared by the husbands and sworn to by both husbands and both wives, the latter making no investigation and accepting in the entirety the statement of the husbands. The court refused to hold that the women by adopting the false statements of their agents, the husbands, without investigating the facts, became themselves guilty of fraud.

The more satisfactory rule, however, was laid down in *Mullin v. Vermont Mutual F. I. Co.*, 58 Vt. 113, where the court, recognizing that as to household effects a wife is usually much better informed than the husband, said:

But if the plaintiff was compelled to get the aid of his wife he assumes all responsibility for her errors as he would for his own * * * if the plaintiff adopted any false statement of the wife respecting a loss, or the value of the goods lost without investigating the facts he thereby became guilty of a fraud himself; and if he made representations to know the facts, when he had no knowledge, and such statements turned out to be false, it was a fraud within the meaning of the policy. He cannot even be honest by turning the matter over to his wife, and omit to inspect her inventory to see if it be correct. If he had looked it over, and wished to be honest, he would have discovered many false statements which were calculated, and probably were intended, to work a fraud upon the defendant. He could have arrested this fraud, if he had done his duty. On the contrary, he recklessly endorsed it without examination, and by so doing made it his own fraud within the meaning of the policy.

In *Mick v. Royal Exchange*, 87 N. J. L. 607, New Jersey held that recovery by an honest assured on his policy would be defeated where he delegated to an agent the task of adjusting and settling a fire loss and the agent fraudulently, but without assured's knowledge, put in false bills of purchases, but on the second trial of the same case held, 87 N. J. L. 628, that, if the agent innocently transmitted to the insurer false bills procured by assured's son who was not his father's agent, the assured could recover his loss.

Decisions to the effect that false swearing by an agent will not avoid the insurance, unless the assured is responsible for it or acquiesced therein, are predicated on the theory that authority from the insured to commit such a wrong should not be inferred.

Fraud and false swearing imply something more than some mistake of fact or honest misstatements on the part of the insured, or a mere mistaken expression of opinion.

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A mere misstatement of the loss, based upon an erroneous estimate of values, which is but the expression of an opinion, does not operate to avoid the policy; the misstatement must be false and fraudulent.

CHEEVER v. SCOTTISH UNION AND N. I. CO.,
86 App. Div. 328.

As respects household furniture, the position of the courts is expressed by the Wisconsin Supreme Court as follows:

It is by no means certain that one can go into the market and find second-hand articles to supply those which have been destroyed, and a housekeeper is not indemnified for the loss of an efficient and useful article unless she can replace it. We do not say that this is the rule of recovery against an insurance company, but that such considerations bear upon the integrity of such a person in estimating the value of an article.

BEYER v. ST. PAUL F. & M. INS. CO.,
112 Wis. 138.

But the over valuation may be so gross as in itself to indicate fraud. So in New York it has been held to be evidence of false swearing sufficient to defeat the insurance where the assured swore that the damage was \$23,000 and the jury found it to be not more than \$5,000, *Sternfeld v. Park Fire Ins. Co.*, 50 Hun. 262, and where the assured swore in his proof of loss that the damage was \$6,700 and the court found it to be only \$1,800. *Anibal v. Ins. Co. of N. A.*, 84 App. Div. 634.

An award of appraisers will be set aside for fraud, and it was recently held in New York in an action on the policy that the underwriter should be permitted to show that an appraisal was reached upon a false basis because of a misrepresentation by the insured of the amount of the lowest bid received for repairing the damage. *Steinberg v. Boston Ins. Co.*, 144 App. Div. 110.

It has been urged that where assured's actual loss, throwing out his pretended losses, exceeded the whole amount of the policy, and that consequently the underwriter was not and could not be harmed by the false statement of additional losses, the assured should receive his actual loss, but the Supreme Judicial Court of Maine answers:

When, therefore, he meets this demand (for a sworn proof of loss) with knowingly false statements of losses he did not sustain, in addition to those he did sustain, he ought to lose all standing in a court of justice as to any claim under that policy.

The court will not undertake for him the offensive task of separating his true from his false assertions. Fraud in any part of his formal statement of loss, taints the whole. Thus corrupted, it should be wholly rejected, and the suitor left to repent that he destroyed his actual claim by the poison of his false claim.

DOLLOFF v. PHOENIX INS. CO., 82 Maine 266.

A contrary view was expressed in Mississippi in *Home Ins.*

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Co. v. Leventhal, 36 Southern 1042, where the difference, however, was between the claimed value of \$3,646.75 and actual cost of \$3,400.

Wisconsin has ruled that:

the law does not undertake to furnish remedies for wrongs which are so impalpable or imaginary as not to cause damage. The law does not regard or treat as a fraud a deception so intangible as not to cause damage. To amount to a legal fraud, it must both deceive and damage.

COMMERCIAL BANK v. FIREMEN'S INS. CO., 87 Wis. 297.

The provisions of the policy under consideration, as well as the provisions of the succeeding paragraph of the policy, begin with the words "This entire policy shall be void." Before the standard policy was written, the courts decided frequently that the contract was severable and that a breach of warranty as to one item did not avoid the policy as to all the items. Mr. Kennedy, Chairman of the Committee which drafted the standard policy, in his address before this Society, stated that it was the intent of the committee in writing the words "This entire policy shall be void" to put into the contract a provision that a breach as to one of the items in the policy amounted to a forfeiture of the insurance on that one item and on all the other items. However, in the case of Donley v. Glens Falls Ins. Co., 184 N. Y. 107, the Court of Appeals adhered to the old line of decisions, as respects a breach of warranty, saying:

Whatever our views might be if the question were new, we regard it as settled that where, by the same policy, different classes of property, each separately valued, are insured for distinct amounts, even if the premium for the aggregate amount is paid in gross, the contract is severable and a breach of warranty as to one subject of insurance only does not affect the policy as to the others, unless it clearly appears that such was the intention.

But where the assured has been found guilty of fraud in connection with the contract, the courts have refused to apply the doctrine of divisibility of the contract. As a text writer has put it:

Fraud as to one item forfeits the entire contract. There is no equity to induce the court to construe the contract as severable in such a case; and this was also the result at common law, without special provision in the policy.

RICHARDS ON INS. (3rd Edn.) 316.

A case frequently cited in this connection is McGowan v. Peoples Mutual F. I. Co., 54 Vt. 211, where the court said:

The general rule, 'void in part, void in toto,' should apply to all cases where the contract is affected by some all-pervading vice, such as fraud, or some unlawful act, condemned by public policy or the common law.

In Moore v. Virginia F. & M. Ins. Co., 69 Va. 508, it appeared that insured, under a policy insuring separately a mill, machinery

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and stock, in his claim and proof of loss swore falsely as to the value of the stock, but not as to the buildings and machinery, and the court applying the maxim, *falsum in uno, falsum in omnibus*, denied him any recovery whatever.

In the case of *Home Ins. Co. v. Connally*, 104 Tenn. 93, the policy, containing the standard policy clause under consideration, insured separately dwelling house and contents. Insured swore falsely as to value of contents. The court argued that the doctrine of divisibility was an equitable doctrine accepted by the courts "as one more consistent with the intention of the parties, or less likely to produce inequitable results to the insured, by affording the courts an opportunity to avoid forfeitures for innocent mistakes often made by the insured," but to permit one guilty "of fraud and false swearing" to recover would be in disregard of that fundamental maxim of equity that "he that doth inequity shall not have equity."

While New York has not squarely ruled on this point, there are intimations in *Schuster v. Dutchess County Ins. Co.*, 102 N. Y. 260, and in the *Donley* case, *supra*, that it would follow.

Oklahoma in a case recognizing the divisibility of the policy made this limitation:

When the contract is not affected by any question of fraud, unlawful act condemned by public policy, or increase of the risk on account of the breach.

MILLER v. DEL. I. CO., 14 Okla. 81.

Minnesota has stated that it will not recognize the divisibility of the contract when it is tainted with "illegality, fraud or increase of risk," *Parsons v. Lane*, 97 Minn. 98, and also "that wilful, false swearing as to one article covered by the insurance policy would avoid the whole policy," *Hamberg v. St. Paul F. & M. Ins. Co.*, 68 Minn. 335.

Maine most satisfactorily disposes of the question thus:

It is further suggested by the plaintiff, that the buildings having been separately valued in the policy, the insurance on them is not affected by any false swearing as to the personal property. The policy of insurance, however, is an entire, single contract, to stand or fall as a whole, so far as fraud, or false swearing, is concerned.

DOLLOFF v. PHOENIX INS. CO., 82 Maine 266.

In conclusion, it is respectfully submitted that fraud on the part of the assured, whether before or after a loss, or false swearing, should avoid the insurance as to every item of the contract, whether or not the risk be separable.

VII INCREASE IN HAZARD

HARTWELL CABELL

Lawyer

As the result of a recent law suit, with which some readers may be familiar, I have reached the conclusion that if there was one lawyer in New York who knew nothing about the word "hazard," as used in insurance policies, that lawyer was myself.

In the case in question I took the stand that if an owner of a building should employ another person to set it on fire, and should put him on a train, headed in the right direction, with a round trip ticket, expense money, a plan of the property and a box of matches, that building was in greater danger from fire than it had been before; in other words, that the "hazard had been increased." I seriously believed I was right. The reader may imagine my feelings when I was told that the hiring of incendiaries, the purchase of their railroad tickets, the drawing of plans and supplying them with matches were mere psychological phenomena, reprehensible in themselves perhaps, but not to be taken seriously. Especially would this seem to be the case where the only motive back of them was to compel a few predatory corporations, foreign and otherwise, to give up some thousands of dollars of their surplus gains.

The learned judges did not go quite so far as to say that a building was entirely safe under these circumstances, but the effect of the decision was to seriously shake my confidence in myself as an expounder of the meaning of insurance terms.

With the warning that, in the circumstances, my opinion on insurance matters is to be taken with a grain of salt, I take pleasure in laying before you what I conceive to be the principles which should govern the interpretation of the policy provision against "increase of hazard."

In determining the rules which should guide us, I shall not attempt to square my deductions with all the decisions. While as to certain aspects of the question the cases are fairly in accord, they are upon other points hopelessly irreconcilable, and we are left to choose between two or more widely divergent views.

The New York Standard policy provision reads:

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This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void * * * if the hazard be increased by any means within the control or knowledge of the insured.

At the outset, it is to be remarked that the language used creates what is technically known as a condition subsequent. The practical importance of this is that while in cases of conditions precedent, such as furnishing proofs of loss, and submitting to appraisal, and examinations under oath, the burden is upon the insured to show that he has complied with them, in order to establish his right of action under the policy; the opposite rule pertains as to conditions subsequent. There, the company has the burden of alleging and proving, as a substantive defense, the breach of the condition upon which it relies as a defense to an action upon the policy.

Warranties and conditions addressed to hazards are of the greatest importance from the standpoint of the underwriter.

The idea of "Constancy of Hazard" may be said to lie at the basis of contracts of fire insurance. The rate of premium to be paid is usually fixed at the beginning of the term, and is determined by the degree of hazard as then known and disclosed to the insurer. If, after the policy goes into effect, this hazard or chance of fire increases, the insured has in most instances either saddled the company with a risk it would not knowingly assume, or else he is getting something for which he has not paid. In either case, when the change in circumstances comes to pass, either by his own act or within his knowledge, good faith which lies at the basis of all insurance requires that he make disclosure and give the insurer the opportunity to either increase the premium or cancel the policy. His silence under the circumstances would in many cases amount to a fraud, either actual or constructive.

Fire underwriters, from the earliest times, have sought to protect themselves from a change in hazard during the life of the policy by various warranties and conditions inserted in their contracts. A form in use in England in the early part of the 19th Century read:

If a building shall at any time be in the possession of or let to any person who shall use or exercise therein, any hazardous trade, or shall be made use of in the storage of any hazardous goods, * * * unless due notice of such circumstances be given to the corporation and mention thereof is made in the policy itself, or be allowed by endorsement thereon, and the rate for such extraordinary hazard duly paid, the policy shall likewise be null and void in respect of such building and the goods therein.

Another early example is to be found in a policy issued by the Protector Fire Insurance Co. (about 1850):

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If after the insurance shall have been effected, the risk shall be increased by the erection or alteration of any stove; the carrying on of any hazardous trade, operation or process; the deposit of any hazardous goods or hazardous communication; the insured will not, except under the consent of the directors and on the terms they may impose, be entitled to any benefit under his policy.

The Massachusetts Standard form of today reads:

This policy shall be void, if without some assent (that of the company printed or in writing) the situation or circumstances affecting the risk shall by or with the knowledge, advice agency or consent of the insured, be so altered as to cause an increase of such risk.

In the New York Standard form, Fraud is the subject of an entire paragraph (lines 7 to 10 inclusive). There follows the paragraph (lines 11 to 30), in which are grouped various contingencies, among them that which we are considering, the happening of any one of which will avoid the policy. Broadly speaking, this entire paragraph treats of hazards which the insurer is unwilling to underwrite, at least at the rate of premium recited in the policy. While the provision against assignment of the policy before loss may be said in one view to be merely a recognition of the purely personal character of the contract, yet even that element has its bearing upon the moral hazard. The purpose of the other clauses is clear. Other insurance, chattel mortgages, and the commencement of foreclosure proceedings, are made grounds for forfeiture clearly because they tend to increase the moral hazard. The requirement that the interest of the assured shall be sole and unconditional ownership in fee simple, is also directed to the moral hazard, and the prohibition of any change in such interest is intended to stabilize the moral hazard during the life of the policy.

The clauses prohibiting the operation of factories at night, the extended employment of mechanics on the premises, the storage of explosives, and the vacancy clause, are all clearly meant to guard against any increase of the physical hazards of the risk.

As compared with the Standard form, the clauses dealing with hazards in the very early policy forms were comparatively simple. In many instances no specific hazards were mentioned, the clause being general in its terms. In others, there were specific prohibitions, such as the prohibitions against the erection or alteration of stoves, the carrying on of hazardous trades and the deposit of hazardous goods found in the Protector Policy already referred to.

Not the least interesting phase of the study of insurance law, is a historical examination of the development of the old and comparatively simple policy provisions into the form as we find it in modern policies.

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In a recent decision (Supreme Judicial Court of Maine in *Knowlton v. Insurance Co.*, 35 Ins. L. J. 81), the highest court of one of our states, in complimentary language, ascribes the clauses specifying the hazards which will avoid the policy, to the wisdom and foresight of the State Legislature. Recognizing the impossibility of anticipating or specifying the infinite variety of changes in the situation and circumstances of a risk that might cause an increase of hazard, the law makers are declared to have been able, in the light of experience, to select a number of specific instances and to provide for them.

The principal objection to this theory is that it isn't true. The gradual additions to the specific enumeration of hazards came, not from the legislative font of wisdom, but from the inherent objection on the part of underwriters to being "done," if I may be pardoned the use of the term.

Under the general clause providing that "any increase of hazard should avoid the policy," each case had to go to the jury. Even where the facts were undisputed, yet the jury was permitted to pass upon the question of "increase of hazard," under the rule that the conclusion to be drawn from the facts is as much within the province of the jury as the ascertainment of the facts themselves.

Needless to remark, the juries who from time immemorial have shown a generous and charitable disposition, and a natural desire to aid the unfortunate, where it could be done without cost to themselves, very generously refused to recognize as increases of hazard, things which the underwriters, in the light of experience and by the lightening of their own pocketbooks, could regard in no other way.

Therefore it was that the companies, for self protection, from time to time selected those specific instances which occurred the most frequently, and by making each the subject of a separate clause, took away from the jury the power to decide whether they were or were not increases of hazard, under the circumstances of each case.

In several jurisdictions, even the specific enumeration in the policy, of the hazards which should avoid it, was held not be enough to stay the hand of juries in their distribution of the assets of insurance companies upon eleemosynary lines. Admitting the fact of vacancy, or night operation or the storage of explosives, these courts held that the jury was still to determine whether the hazard was thereby increased. In the absence of some statute which

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would override the contract, these decisions were clearly wrong. It is undoubtedly the law that where the insurer has provided that the happening of a certain event, or the coming into existence of a certain fact shall avoid the policy, such a stipulation in the absence of statute is binding upon the parties; and where the event happens and the fact is undisputed, there is nothing left for the jury to determine, and the court declares the contract at an end as a matter of law.

The general clause we are considering has been retained in connection with the special clauses, for the obvious purpose of protecting the companies against instances of increase of hazard which either can not be foreseen, or which occur so seldom as not to justify the addition of further provisions to an instrument already too long.

The insertion of special clauses in addition to the general clause has one effect which it is important to bear in mind: Where a certain contingency is provided for by a special condition, this contingency is taken out of the general provision.

A rather interesting example of the application of this rule of construction is found in *Herrman v. Merchants Ins. Co.*, (81 N. Y. 184). The policy contained a condition avoiding the insurance in case the building became "vacant and unoccupied." The court defined the words as having each a separate meaning; the house being unoccupied when no one lived in it, but not being then necessarily vacant; while a house filled with furniture throughout, although unoccupied, would not be vacant, because the primary meaning of the word "vacant" is "empty." Therefore, the court refused to permit the company to show that non-occupancy increased the hazard, even though the premises were not vacant, on the ground that the company elected to consider non-occupancy as an increase of hazard only in connection with the vacancy of the premises, and that, therefore, the general condition contained in the policy against "increase of hazard" would not apply.

The same principle is applied in cases where repairs are being made on the premises. The shavings and other refuse left by mechanics undoubtedly increase the hazard. So also the burning off of old paint by the use of a gasoline torch. But the language of the policy permitting, by inference, the employment of mechanics in the building, altering and repairing the same, for periods of not

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more than fifteen days, is held to prevent a forfeiture where the alterations and repairs are within the permission, even though they admittedly increase the hazard.

One sharp distinction is to be observed between defenses predicated upon the general provision against increase of hazards, and the specific clauses covering the explosives, vacancy, etc. While, as we have seen, cases arising under specific clauses, where there is no dispute as to the facts, present a mere question of law for the court, defenses based upon the alleged breach of the general provision present a question of fact always. It can never be said as a matter of law that any particular change in the condition of the property insured or any act or omission on the part of the owner or his agent increases the hazard. What constitutes an increase of hazard is always essentially a question of fact. (*Firemen's Ins. Co. v. Appleton Paper Co.*; 101 Ill. 9; *Halpin v. Ins. Co. of North America*, 10 N. Y. St. Rep. 345).

The clause against increase of hazard, while apparently simple upon a casual examination, is by no means free from difficulty when we come to apply its language to concrete cases. It says too much. It cannot be applied literally without depriving the assured of the very protection for which, under the general principles of insurance, he has contracted.

Take for example the phrase "within the knowledge or control of the assured." This language can not be enforced. If it were, the breaking out of a fire in neighboring premises at any time during the life of the contract would, if known to the insured, although beyond his control, automatically terminate the contract. Yet the loss of property from the spread of such a conflagration is one of the contingencies against which the policy is intended to protect the owner. So if after the issue of the policy the insured should learn of a conspiracy to burn his property, and if before he could take steps for his protection the property should be destroyed, he would be without relief against the company. Any number of similar hypothetical cases suggest themselves; where the hazard has been increased; where such increase is either within the knowledge or control of the insured; and yet no defense based upon the provision we are discussing would prevail.

Considered in its entirety, however, and when construed from the standpoint of common sense, the effect of the general provision is far reaching. As pointed out by the Massachusetts court, in *Houghton v. Manufacturers Mutual Fire Ins. Co.* (80 Metc. 114),

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such a provision binds the insured, not only not to make any alterations or changes in the structure or use of the property, but also prohibits the introduction of any practice, custom or mode of conducting business which would materially increase the risk, and prohibits the discontinuance of any precaution represented in the application to be adopted and practiced with a view to diminishing the risk. It is practically a stipulation that the mode of conducting the business in effect at the time of the issue of the policy shall be substantially observed, and the precautions against fire then being taken shall be substantially continued to be taken during the life of the policy.

A discussion of the clause to be of practical value must be based upon some definite plan. I have concluded that the best way is to group the cases and contrast the decisions as to each aspect of our subject, and where the decisions are not in accord, to try to draw from the best considered cases some rule which it will be fairly safe for underwriters and their adjusters to follow and which will at least have the support of reason and common sense.

The first thing to determine is what is meant by the words "increase of hazard." As a learned text writer on the subject of insurance says:

It must not be forgotten that hazard is of necessity a variable quantity. It changes constantly from day to day, and sometimes imperceptibly, from the operation of the laws of nature and from various circumstances beyond the control of the insured.

Strictly speaking every loss under the policy is preceded if only momentarily by an increase of hazard, otherwise there would have been no loss.

Therefore the policy must mean, not every increase of hazard, but those falling into one or more classes, more or less related, and excluding cases which although included by the literal meaning of the phrase "if the hazard be increased," are nevertheless to be considered as covered by the policy. To make myself clear, take for example the casual acts of negligence of the owner or his servants, such as the use of coal oil to light fires, or the leaving of oil rags, exposed matches, or rubbish, on the premises. These acts or omissions undoubtedly increase the hazard and may be both within the knowledge and under the control of the insured, and yet are held to be included in the risk undertaken by the underwriter, and not such increases as will avoid the policy.

We may as a starting point ask: does the language in the policy refer to *temporary* increases of hazard, such as the storage

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of dynamite over night, or must there be some enhancement of the risk of a more or less stable and permanent character?

Looking at the question from still another standpoint, we may consider the increase of hazard with respect to the location of the danger with reference to the premises of the insured. My attention has been especially called by your Secretary, to cases where, in our modern loft buildings, the increase of hazard is claimed to arise from dangers located not in another building, but in the same building which contains the subject of insurance, but in premises entirely separate from the insured premises and occupied by a different tenant.

The clause may further be considered in so far as it relates to moral hazards other than those especially provided for in the policy.

Finally we should consider the meaning of the phrase "within the knowledge or control of the insured," as relating to "imputed" knowledge and control by agents.

(a)

Nowhere in the policy is there any distinction drawn between the permanent and temporary character of increase of hazard which will defeat recovery. Logically, a deliberate or permitted increase of hazard, when material, imposes a burden upon the insurer for which he has not been paid, whether the increase be permanent or temporary. The question is one of degree and not of kind. In no branch of the law does the old saw "Hard cases make bad law" cut deeper than in Insurance Law. Courts constantly evade logical conclusions and ignore the evident intention of underwriters in drafting their contracts, in their effort to avoid forfeiture in "hard cases."

Very early in the history of Fire Insurance, courts declined to predicate a forfeiture upon merely temporary conditions.

In *Dobson v. Sotheby* (Moo. & M. 90, sometimes referred to as *The Tar Barrel Case*, and decided many years ago, the building had been insured at a very low rate of premium, only applicable on buildings where no fire was kept and no hazardous goods were stored. A barrel of tar was brought into the building to be used in connection with repairs which were being made. The tar caught on fire and the building was destroyed. Lord Tenterden held that the prohibition against fire and the storage of hazardous goods meant fire habitually used and hazardous goods habitually deposited, and the mere incident of the tar barrel being there for the purpose of repairing the building, was not sufficient to avoid the policy.

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In *Shaw v. Robberds* (6 A. & E. 75), decided early in the 19th century, the subject of insurance was a kiln which had been erected for drying wheat. A vessel loaded with bark sank in neighboring waters, and the owner of the kiln out of kindness permitted its use in drying out the bark after it had been taken from the sunken vessel. The policy provided that if any alteration were made either in the building or the business carried on therein, notice should be given to the insurers, who would endorse permission on the policy and receive additional premium; otherwise the policy should be void. The jury found as a fact that the drying of bark was a more dangerous business than drying wheat, thereby it would seem establishing a clear case of increase of hazard. The court held however that an isolated and temporary instance of increase was not in contemplation of the underwriters and did not avoid the policy.

In *Adair v. Ins. Co.* (107 Ga. 297), the policy covered a dwelling house and contents. The husband and agent of the insured brought a threshing machine upon the premises temporarily, for the purpose of threshing some wheat. The work only required about two hours, but in that time a spark was blown by an unexpected gust of wind, in the direction of the house, which caught fire and was destroyed. In the lower court plaintiff was non-suited, but the supreme court of Georgia reversed the case holding that the question whether a breach of warranty had been committed by such a temporary and incidental use of the engine, was for the jury.

The case is wrong in principle. The action involved the construction of a written instrument. Under our laws, that is always for the court, not for the jury. In the two English cases I have cited the juries found the facts and the courts construed the language of the policy not to contemplate or include such facts. Whether right or wrong in their conclusion, the judges at least proceeded upon the right theory. But the Georgia Court practically left it to the jury to determine whether the increase of hazard resulting from certain admitted facts was or was not within the prohibition of the warranty or condition of the policy: In other words, the jury and not the court was to construe the policy and ascertain the meaning of the language used by the underwriters.

In *Kenefick v. Ins. Society* (36 Ins. L. J. 817), the Missouri Court refused to treat a temporary increase of hazard as not being within the policy condition against increase of hazard. Dynamite was stored in the building temporarily but had been removed by the

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firemen during the fire and did not contribute to the loss. In holding that the policy was forfeited the Court said:

If the appellant had known that the dynamite and other explosives were put, kept, or allowed in the building it would have cancelled the policy as quickly as possible * * *. That the storage of the explosives in the building by plaintiffs increased the risk and was a clear violation of the express provision of the contract of insurance, admits no doubt. By this act the policy was forfeited and the plaintiffs should have been unsuited unless there was a waiver of the forfeiture.

Coming to the decisions of our own Courts:

In *Townsend v. Northwestern Ins. Co.* (18 N. Y. 168), the policy provided that if after the insurance was effected the risk should be increased by any means whatever *within the control* of the assured, the insurance should be void. This language was held not to prevent ordinary repairs, and although a force pump was put out of commission for a short time while repairs were being made, and the risk thereby increased, yet such increase of hazard was declared not to be within the prohibition of the policy, provided the repairs were made with reasonable diligence.

In *Williams v. Peoples Fire Ins. Co.* (57 N. Y. 274, the policy condition was that if the hazard be increased by any means whatever, *within the control* of the insured, the policy should be void. It appeared from the proof that the insured, for several months before the fire, kept upon the premises a jug of crude petroleum for medicinal purposes. It was shown that the petroleum was not the cause of the fire but evidence was given tending to show that its presence was dangerous and increased the hazard. The court below refused to charge that, as a matter of law, if the presence of the petroleum increased the risk the plaintiff could not recover. The Court of Appeals reversed the judgment for the assured, but held that it was a question of fact for the jury to determine whether the risk was actually or materially increased, and if it was, it avoided the policy. The language of Earle J. in the opinion read by him directly bears upon the point we are discussing:

If the presence of the petroleum in the room where the insured property was, had been only casual or temporary, for some use connected with the store or the merchandise therein, or the occupants thereof, it would probably not have increased the risk within the meaning of the policy. But here it was kept permanently for five or six months.

Although there are several cases in other states which seem to recognize a temporary increase in the physical hazard as ground for forfeiture, the weight of authority is the other way. The general rule seems to be that there must be something in the nature of a

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permanent change either in the premises themselves or in the manner of their use, to justify a court in declaring the policy void for increase of physical hazard.

(b)

Taking up the question of location, and again referring to the language of the policy, there is nothing to indicate that there was any intention on the part of the underwriters to limit either the area within which the increase might arise, or the source from which it might originate. In order to invalidate the policy they must either be known to or under the control of the assured. Outside this limitation the only question was evidently intended to be, whether there had arisen some danger material and actual, and not contemplated by the parties when the rate was fixed and the contract entered into.

We may divide the authorities, for convenience, into those which deal with new dangers in and upon the premises insured; new dangers arising in premises owned and controlled by the insurer and lying near to or adjacent to the insured premises; those which occur in the same building, that is under the same roof, but in different premises occupied by persons other than the insured; and lastly those occurring in adjacent property, outside the building which is or contains the subject of insurance, and owned or used independently and by other persons.

Where the facts disclose a material increase of hazard originating in the premises insured and of the kind contemplated by the underwriters, in inserting the provision against increase, courts have almost unanimously decreed a forfeiture. In answering a hair splitting contention on the part of plaintiff's counsel in such a case, Judge Ruger of the Court of Appeals said in *Mack v. Rochester German Ins. Co.* (106 N. Y. 560):

It tends to bring the law itself into disrepute, when, by astute and subtle distinctions, a clean case is attempted to be taken without the operation of a clear, reasonable and material obligation of the contract.

There has been little hesitation on the part of the courts in giving the underwriters the full benefit of their contract, where the assured himself has brought about an increase of hazard by erecting buildings and by other acts upon premises owned or controlled by him and lying adjacent to the insured premises.

In an early New York case, *Murdock v. Chenango County Mutual Ins. Co.* (2 N. Y. 210), the policy provided that if the risk be increased by any means within the control of the insured the

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policy should be void. The insured erected other buildings on the premises so as to increase the hazard and it was held he could not recover. Several other New York cases are to the same effect.

In the Horan case, (89 Pa. St. 438), the insured had increased the hazard of the building insured by erecting a dwelling house adjoining. He claimed however that by removing a carpenter shop which had theretofore adjoined the insured premises, he had evened things up and was entitled to recover, and the lower court took that view. On appeal it was held he could not set off one risk against another, and that since he had increased the hazard he could not recover. To the same effect is *Albion Lead Wks. v. Williamsburg City F. Ins. Co.* (2 Fed. 479).

It is when we come to consider cases where the new danger arises from the acts of other and independent owners or tenants that we find the courts inclined to narrow their construction of the policy.

The Texas Court of Appeals held that a stipulation against an increase of hazard should not be construed so as to cover risks created on adjacent property of independent proprietors who use their property in a legitimate manner. (*Sun Ins. Co. v. Texascana Co.*)

In a Colorado case, *State Ins. Co. v. Taylor*, (14 Colo. 449), the court held that a clause providing that the policy should be void if the hazard be increased without the written consent of the company, was to be interpreted as applying only to the premises insured and adjacent property subject to the control of the insured, and must not be extended to cover the acts of contiguous owners. The Court said:

There is nothing in the language used which would extend it to the property not under his control and the acts of others, and hold him responsible for the acts of his neighbors or of contiguous owners, and requires him to keep informed as to the manner in which other persons in the neighborhood used their property or to communicate the facts to the insurer.

The New Hampshire Standard policy declares that the policy shall be void if without the assent of the insurer "the situation or circumstances affecting the risk, shall, by or with the knowledge of the insured, be so altered as to cause an increase of such risk."

The Supreme Court of that State held in *Janvrin v. Rockingham F. Mut. Ins.* (70 N. H. 35), that this language was broad enough to cover all such acts of neighbors done on their premises as would increase the hazard of the insured property, where known to the insured, even though such acts were not within his control.

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Eager v. Fireman's Fund Ins. Co., decided by the General Term of the Supreme Court in the Fourth Department (71 Hun. 352), and affirmed by the Court of Appeals, upon the opinion below (148 N. Y. 726), may be considered as controlling in this State. There the insured at the time the policy was issued occupied part of a four story brick building as a hardware store. Other parts of the premises were used for manufacturing a wood filler known as protine made from wood alcohol; the building also contained stored furniture, and a portion of it was vacant. After the policy was issued parts of the building were rented and used as a shoe factory and a box factory, and a forfeiture was claimed for increase of hazard. The referee decided there was no increase, and in this he was sustained by the upper Court. The trouble was that most of the evidence offered by the Company was directed to showing that the new use was more hazardous than the hardware business. No effort was made to show that it was more hazardous than the manufacture of wood filler from alcohol or the storage of furniture, both of which were known hazards at the time the policy was issued. The language of the court however leaves little doubt that if there had been a real and substantial increase of hazard shown to exist of which the insured had knowledge, the fact that such hazard originated and existed in parts of the building not under the control of the assured would not have prevented a forfeiture. The court looked more at the character than at the quantity of hazard however. In other words, the question seemed to be: "Has there been a new use materially more dangerous than any use to which the building was being put at the time the policy was issued?" not, "Has there been an added danger in the shape of a new business, not more dangerous than the existing uses but which increases the hazard on the theory that there are two or more possible causes of fire now where before there was only one?"

(c)

MORAL HAZARDS.

I believe I am not far wrong when I assert that to an insistence upon moral hazards as grounds for forfeiture, is largely due the hostile attitude which both courts and juries are too apt to assume towards insurance companies.

Underwriters justify their stand by pointing to the nature of the contract, and the fact that they are to all intents and purposes at the mercy of the assured, and dependent upon his good faith and honesty. He remains in possession of his property. His financial

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condition; the actual value of the property to him; the existence of secret motives either in himself or others to destroy his property; all these and many other things are or may be known to him, and cannot, in the nature of things, become known to the company except by chance. Therefore, says the underwriter, "we are justified in defending ourselves both against the temptation of the assured to burn his own property in order to realize its market value, and the equally serious temptation to protect himself at our expense from loss at the hands of enemies, the existence of whom is known to him and unknown to us."

The argument is sound enough, but the difficulty is, it pre-supposes that the assured will yield to temptation on the one hand and will deliberately deceive the company for his own protection on the other. This presupposition ignores one principle of the common law which we have all lived with, and met at every turn of our lives, until it is instinctively a part of our scheme of life in our association with others. That principle is that every one is presumed to be innocent of wrong doing until his guilt is established by competent evidence. Under our laws, however guilty in fact a man may be of the offense with which he is charged, before he can be required to pay the penalty he must be proved to be guilty. He is not even called upon to defend himself until a *prima facie* case is made out against him in a court of competent jurisdiction. Then the law gives him every chance to prove his innocence, and the benefit of every reasonable doubt.

Yet the underwriter by the terms of his contract in effect says to the insured: "Where you own a building, the ground belonging to another, or where your chattel property is heavily mortgaged and you are hard up or threatened with foreclosure, or where you are overinsured, we conclusively presume that you will set fire to your own property, regardless of whether you are in fact honest or dishonest." In other words, "We will presume your guilt without proof and will forfeit your policy as a consequence."

That the one position is directly opposed in spirit to the other, needs no argument, and I believe this inversion of the principle of common law is largely responsible for the hostile spirit with which both courts and juries have treated underwriters.

It is a serious question in my mind whether you would not gain in the end, by stripping your contract of many of the forfeiture clauses, and relying upon the general principle that fraud, however subtle and novel, will, if proved by a fair preponderance of evi-

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dence, be a complete bar to a recovery. You would, I believe, find the courts and even juries willing to protect your rights, and their changed attitude would be more efficient in guarding those rights than the plan you have pursued of inserting forfeiture clauses in the policies.

This comment is perhaps not strictly within the subject-matter of this paper. The clauses indicating the several moral hazards which will void the policy, unless consented to by the company, are the law of the state of New York by its adoption of the standard form, and since the clause against increase of hazard is broad enough in language to include both physical and moral hazards, it is necessary for us to determine the limits which have been placed upon its language with respect to moral hazards by judicial construction.

A line of very interesting cases bearing upon the subject will be found in the Texas Reports.

Scottish Union & Nat'l Ins. Co. v. Weeks Drug Co., came before the Court of Civil Appeals for the Fourth District (118 S. W. Rep. 1087). The property covered by the insurance was a drug store and its destruction was admittedly the work of an unknown incendiary. The undisputed evidence showed that a few days before the fire an unsuccessful attempt was made by an unknown incendiary to set fire to the building in which the insured property was situated. This attempt was made known to the president of the drug company on the night it occurred, and within a few minutes after it was discovered. Yet the drug company did not inform the insurance company of the attempt to destroy its property and did nothing to prevent a repetition. The policy contained the identical provision against increase of hazard that is found in the New York Standard form.

In commenting upon the failure of the drug company or its president to notify the insurance company of the incendiary attempt, and in the face of the admission made by Weeks, the president of the company, on the stand, that he believed if he had been five minutes later in discovering the situation the house would have burned up and he believed somebody was trying thereby to burn the building, and that he did not notify the insurance company nor its agent, the court said:

We would not undertake to hold that this was a breach of said provision (against increase of hazard), as a matter of law. A continuing danger if known would properly have come within the provision

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but whether or not a single effort to burn the house would cause one to consider it likely to be repeated until successful would involve a presumption of fact which should always be left to the jury.

The same facts came before the Court of Civil Appeals of the First Supreme Judicial District of Texas, in *Williamsburg City Fire Ins. Co. v. Weeks Drug Co.* (132 S. W. Rep. 121), and the court there reached the opposite conclusion. They say:

The policy of insurance contains the following provision "This entire policy shall be void if the hazard be increased by any means within the control or knowledge of the insured." This court is of opinion that under this provision of the policy and the undisputed evidence in the case which establishes the facts before stated, the policy sued on was void at the time the loss occurred and the appellee cannot recover thereon.

The court then commented on the fact that the court of the Civil Appeals for the Fourth District in the *Scottish Union & National Ins. Co.* case had come to a directly contrary conclusion and certified the *Williamsburg City* case to the Supreme Court of Texas for final determination.

That court reversed the *Williamsburg City* case and upheld the doctrine of the *Scottish Union* case. They construed the policy provision against hazards as applying only to the insured premises or to property under the control of the insured. They held that there is nothing in the language used which would extend it to the property not under his control, and to acts of others, and that he is not required to keep informed as to the manner in which other persons in the neighborhood use their property, or to communicate the facts to the insurer. They further held that the wilful burning of property by a third person is one of the risks against which it is the purpose of the insurance to protect the insured; that it is to be classed with risks arising from mere negligence which are included among the risks insured against, and that it should not be implied that the provision against increase of hazard was intended to exclude such risks from the coverage of the policy.

In *Hartford Fire Ins. v. Dorroh*, (133 S. W. Rep. 465), the Court of Civil Appeals of Texas, again had a very similar question before them. It was proved that Dorroh a few days prior to the fire had received an anonymous letter to the effect that some merchant below him was moving his goods out at night, and he had better look out. He said nothing about this letter to the company and very shortly after that the building was destroyed by fire. The court held in the first place that the mere receipt of such a letter was not in itself sufficient evidence of an increase of hazard; that

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the burden would be on the company to show that the facts stated in the letter were true, but it went further and following the reasoning of the prior cases said:

Let it be assumed that such facts indicated that an incendiary fire was likely to follow which would endanger, if not destroy, Dorroh's property. Can it be said that this would establish the right to claim the forfeiture insisted upon in the case: We are disposed to think it cannot, for the reason that it would not establish the existence of an increased hazard: within the meaning of this policy. Here the insurer undertakes to indemnify the insured against the possibility of a loss by fire for an agreed consideration paid in advance. The hazard here referred to evidently means the possibility of a loss by fire created by the sum of all dangers resulting from the recognized exposure. It is a matter of common knowledge that accepted insurance risks are graded, and premium rates adjusted, according to the physical conditions and surroundings of the property insured. It is also well known that many fires are of incendiary origin, and that in the transaction of their business insurance companies must take into consideration the dangers arising from that source in estimating the extent of the hazard they assume in all ordinary risks. This is what they call the "moral hazard." We think it will hardly be denied that in the same community and among the same class of people, at least, this element may be regarded as a constant factor, entering alike into all insurance contracts and risks taken. Hence it follows that a loss resulting from incendiarism for which the insured cannot be held responsible is one of the dangers against which he secures protection by the general terms of the policy. It is one of the dangers which the company assumes when it makes the contract of insurance, and not one which it may claim arises subsequently and adds to the original hazard. The increased probability of a loss by incendiarism could no more be considered an "increased hazard" which would avoid the policy than could the increased probability of a fire from any of the physical exposures existing at the time the policy was written.

While the danger from incendiarism may with propriety be considered as a substantial and constant factor in the insurance business as conducted in Texas communities, the New York courts have not yet committed themselves to that view with respect to the morality of our own citizens.

In the Donley case (184 N. Y. 107), the plaintiff in his application for the policy asserted that he had no reason to fear incendiarism. The Court of Appeals granted defendant a new trial because the trial court had refused to allow proof of declarations of the assured to the effect that numerous previous fires on his wife's property had been caused by his enemies for the purpose of injuring him. Judge Vann said in the opinion:

The moral hazard, to which insurers properly give much heed, was materially increased by the danger that his enemies would destroy his property as they had previously destroyed that of his wife and for the same reason.

It is true that this case turned, not upon the hazard clause, but upon the question and answer in the application considered as a warranty.

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It is of interest because it recognizes danger from incendiarism as a moral hazard, and the logical conclusion would seem to be that if an increase of this danger occurred after the policy was issued and became known to the insured, such an increase was within the contemplation of the clause we are considering.

In the Ampersand cases however, the Court of Appeals showed a strong inclination to confine increases of hazard which would avoid the policy, to acts done to the property causing an increase of physical hazard which the assured knew of or could have prevented.

The language of Judge Gray was:

Ordinarily, we understand, and so the decisions run, that the hazard of insurance is increased when the risk is changed by some new use of, or some other burden placed upon, the property; that is to say, when the physical status, or condition, of the subject of insurance is rendered, by some act of the insured, other than what it was when the insurance was applied for and the application acted upon.

Of course if this is to be taken as the last word upon the subject, it would be useless to contend in New York that even such incendiary threats of third parties as occurred in the Donley case, constitute increases of hazard, within the meaning of the policy. As moral hazards and not physical hazards they would, by the interpretation given by Judge Gray, not be covered by the policy clause against increase.

In its future consideration of the subject it is doubtful, however, if the Court of Appeals will continue to apply to its fullest extent, the sweeping language of the Ampersand decision. There is nothing in the policy itself to indicate that the underwriters intended the clause to apply with any greater force to physical than to moral hazards. It is, as we have seen, a general "Catch-all," occurring in connection with specific increases of hazard which shall avoid the policy, some of which are moral and others physical, and was intended obviously to cover all hazards of either kind, which might thereafter occur other than those in contemplation of the parties at the time the contract was made and the premium fixed.

As Mr. James C. Carter used to say "Nothing is decided until it is decided right." We may live in hopes that some day the Court of Appeals of New York will look upon the opinion of the majority of that court in the Ampersand case as an unfortunate misconception of the contract, due to the failure of counsel for the insurance companies to clearly present the question involved.

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Our discussion to this point has been confined to things and events viewed as increases of hazard within the knowledge of or control of the assured personally.

The question is still to be answered how far the knowledge of his agents and the acts of such agents and of tenants and other persons sustaining legal relations with the assured, will be taken to work a forfeiture under the policy.

This paper has already reached such length that a consideration of the cases themselves, some of which are of considerable interest, must be passed over. It may be stated generally that by a preponderance of judicial opinion, including that of the Supreme Court of the United States, and of the Court of Appeals of New York, the assured is responsible for the acts of his duly authorized agents, and the knowledge of the agent acquired while acting within the scope of his authorized employment is to be imputed to the principal. (*L. & L. & G. Ins. Co. v. Gunther*, 116 U. S. 113 *Cole v. Germania Fire Ins. Co.*, 99 N. Y. 36). When it comes to acts of the tenant, the question turns upon the language of the clause. If the acts are such as would be recognized as increases of hazard within the meaning of the policy, if done by the assured himself, and if such acts are known to the assured, the policy will be avoided. And again, if acts of that description are done by the tenant, and if the assured landlord has by the terms of his lease retained authority over his premises by which he could have prevented it, the courts would in all probability hold the policy forfeited. If, on the contrary, the acts of the tenant constituting the increase were unknown to the assured and could not have been prevented by him if known, the resulting increase would not come within the policy condition.

In closing, there is one thing to be remembered in connection with our subject. Increases of hazard, to be available as defenses, must be real and substantial, not imaginary and insignificant. The facts when ascertained should be looked at, not as support for a possible defense, but with a view of determining whether they fairly and clearly show that an unfair advantage has been taken of the company. Every time an insurance company insists upon a hair-splitting defense, it adds to the hostile feeling against underwriters to which I have referred. In a Kentucky case counsel for the company solemnly argued that the property had been insured as a dwelling house; that a dwelling house was defined in his dictionary as a place where people slept; that the house which had been burned

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contained a kitchen; that people did not usually sleep in kitchens, but fires were constantly kindled there: Hence, the hazard had been increased, and the plaintiff should be nonsuited. In the same state another lawyer insisted that the failure to keep books of account such as are provided for in the iron safe clause, increased the moral hazard of the risk and there should be no recovery.

Needless to say neither defense prevailed, but such misguided efforts as these merely add to our difficulties when we stand before courts and juries to insist upon defenses having real merit.

One more illustration of what I mean when I urge you to disregard immaterial facts even though they may seem to justify a technical forfeiture.

Not long ago I was arguing an appeal based upon the chattel mortgage clause. A large part, but not all of the property insured was covered by a chattel mortgage, and I claimed the insurance was forfeited as to the entire property. The presiding judge put this question to me: "Suppose a man owns \$10,000 of chattel property all unencumbered, with the exception of a \$250 piano, which he has bought on the installment plan, and on which he has given a chattel mortgage to secure the deferred payments; would the existence of that mortgage, not consented to by the company, forfeit the entire insurance?" The case was of course an extreme one, but I have no doubt every man in this room has considered cases in which chattel mortgages, the existence of which could not by the wildest flight of the imagination be held to increase the moral hazard, could nevertheless be urged as ground for forfeiture under the unqualified language of the policy. The answer is: "The law does not concern itself with trifles" (*De minimis non curat lex*).

The settled policy of the law is to ignore things of no relative importance, where they are relied upon to defeat or control important legal rights. Some months ago I found a case on a life insurance policy which furnishes an admirable illustration of what I mean. The defense was that the insured, who had been killed in an accident, if I remember correctly, had stated in his application that he had not within a certain time been attended by physicians, whereas the proof showed that within that time, and several years before he had applied for the policy, he had received several visits from a doctor who treated him for a bad cold. The court brushed aside the defense, quoted the maxim I have just referred to, and declared that courts would never consider such trifling and immaterial things where they were sought to be interposed to defeat recoveries under insurance policies.

VIII

OWNERSHIP

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A statement of the law respecting the ownership clause of the standard policy is not without difficulty, and one may only venture to interpret the New York decisions which are reported in the available authorities.

In discussing ownership of, or interest in the subject of insurance, the writer disclaims originality or authorship, and merely attempts to follow judicial discussions on the subject from comparatively recent times, and to submit a general statement of the law in the State of New York, without citing more than a few leading authorities in support of the conclusions; to do more would result in producing a digest, so numerous are the decisions.

It will not be helpful to emphasize the uncertainties and oddities of the law; those who are actively engaged in the business of underwriting are qualified to decide quickly and accurately most of the problems presented from day to day, and they may safely tread the beaten path until some judicial revolutionist has exercised ingenuity in a case of seeming hardship, and has evolved another ground upon which to escape the stern logic of principle whether by waiver, estoppel or other equally unsatisfactory ground.

With independent jurisdiction in each state and also in the federal districts, decisions upon the construction of the contract and upon the liability of the insurer are not infrequently conflicting and discordant. It is therefore with diffidence that one may give an expression of the law upon any particular question of insurance which will be of general application; and it is with equal diffidence that a statement of New York law can be made on several debatable questions which have not yet been settled by the court of last resort.

The great conflagration of London in 1666 stimulated the community to secure protection against fire, and a few years later the first important concern to grant insurance against loss by fire is said to have been established in that city to cover buildings only; and shortly thereafter insurance was extended to cover loss on personal property. From that time the business has increased steadily

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and in large measure, so that it has become one of the most important branches of commercial endeavor. The advantages and the failings have been recognized and have been constantly under discussion. The insurer has met many waves of prejudice and attacks from courts and legislatures, but these have been successfully overcome and it may be said that today the business is on a broader and higher plane than at any previous time, and it certainly is established more firmly in the favor of the business world.

In a spirit of keen and wasteful competition, the insurer did not always regard the precise form of indemnity and his natural effort to increase profits permitted laxity in the form of policy, and often led to a reckless disregard of the true principle of insurance; accordingly the courts have been continuously called upon to decide perplexing questions of construction, with the result that uncertainty and conflict have arisen, and generally to the disadvantage of the insurer. So that the time seems to have arrived to consider means of preventing unnecessary insurance litigation. From the beginning the form of contract was of the highest importance; it was necessary for the merchant promptly to receive his just claim; it was not less necessary that dishonest claims should be condemned and fraud exposed; the moral hazard attending a risk has always been a controlling factor in any form of contract, and the personality of an owner who applies for a policy and his interest in the subject of insurance are the first considerations.

The primary purpose of fire insurance is indemnity. A simple agreement to insure a party would cover the risk in an ordinary case, but difficulty arises when special forms are required to cover a particular risk. To guard against imposition on the part of the insured, and also to meet the requirements of business, the form of agreement necessarily became rather technical. The law which has grown up from the customs of merchants, furnishes a natural and appropriate rule of liability, just as a contract may be enforced with least friction which has originated with the merchants who demand its protection and who will answer for a violation of its conditions. That law only is satisfactory which responds to commercial needs, and similarly an insurance contract must accord with sound business and fairly protect both parties. The concept of the law by the merchant cannot be disregarded, nor can his popular construction of a contract be successfully answered by the rigid application of a clause which operates unjustly.

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In every case the insured should be interested both in the prevention and the extinction of fires, and under no circumstances should there be a possibility of double payment. Such a result is avoided by covering the special interest of the insured, but the freedom with which insurers issue forms covering several interests in the same property may result in excessive if not double payment for a single loss.

In recent years the insurers in this country have made commendable efforts to meet the reasonable demands of the insured and at the same time to insist upon a standard of mutual fairness; and there has long been a constant agitation to secure a uniform policy for use in all the states; such a form was earnestly advocated by the National Board of Fire Underwriters at meetings in 1867 and 1868, and the obvious objections to a peculiar form for use in any one state were pointed out.

From that time to the present day the form of insurance contract has been before courts and legislatures and has been the subject of debate by many associations. In the early fire insurance policies the insurer merely agreed to make good unto the insured loss or damage by fire not exceeding the amount specified nor the interest of the insured in the subject matter; and it was generally provided that if the interest was other than unconditional and sole ownership, it must be so expressed, and also that the policy should be void in case of sale or transfer. The present policy is not substantially different in stating that the Company does insure the individual against all direct loss or damage by fire.

It may not be generally known that Connecticut, which has long held a commanding position as an insurance centre, adopted the first legislative enactment for a standard form. In 1867 the Legislature of that state adopted an act for uniform conditions as to the risk (Chap. 121, Laws 1867); but this policy was unsatisfactory in many of its provisions and it aroused such strong and well grounded criticism that the act was repealed in the following year (Chap. 7, Laws 1868 and see Chap. 4, Laws 1868).

Massachusetts promptly took up the question and in 1873 passed an act to establish a standard form for insurance policy, which was set out in the statute; that state thus adopted the first standard form which, with various changes and additions, has continued in use (Chap. 331 Laws 1873).

New York followed in 1886 by enacting a statute requiring insurers to use a standard policy (Chap. 488 Laws 1886) and pur-

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suant thereto the Superintendent of Insurance approved the form which has since been used in this and other states with great satisfaction to all concerned, and which has fairly served its purpose of solving many doubts and preventing many controversies.

We shall always pay tribute to the framers of the wise and comprehensive contract which was produced in this State as a result of the work undertaken by a Committee of the New York Board of Fire Underwriters in collaboration with the National Board, aided by distinguished counsel. This policy is plain in its language and sufficiently flexible to be adapted to nearly every ordinary case; the facility with which its clauses operate is indeed remarkable; it permits the insurer to issue a binding contract practically without investigation, and thus affords a safe and economical method of granting insurance almost on demand.

By careless practice all the safeguards of the standard policy, evolved after great care and thought, may be rendered nugatory by a form which an inexpert and zealous clerk accepts in the haste of daily duties; and much of the litigation has arisen from such an unintentional departure from the standard policy. The standard form recognizes the primary principles of insurance, and a brief reference to the application of the clause under consideration to different classes of risk will present the rationale of many of the decisions.

True fire insurance does not insure property. It insures the interest of a party in property. The necessity for an insurable interest is based upon the cardinal principle that a contract of insurance is essentially one of indemnity and not one for profit. There can be no claim for indemnity where there is no loss, and no loss where there is no interest. Insurance contracts without an interest on the part of the insured were permitted at common law, but it soon appeared that they afforded temptation for wrong-doing and remedial legislation was effected in the famous statute against wager policies adopted in England in 1774 (Stat. 14 George III.) Similar legislation against wagers is contained in the law of this State (Penal Code, Sec. 973) and the statute expressly provides that it shall not extend to "insurance made in good faith for the security or indemnity of the party assured."

With no interest, the policy is now deemed a wager, which has been defined as the hope of gain, but not indemnity against loss; or as a seeking of gain through chance, as opposed to a contract to avoid loss by reason of chance. It has been aptly said that "the gambler courts fortune; the insured seeks to avoid misfortune."

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The test in determining whether an insurable interest exists is to inquire whether the insured is so situated with respect to the subject matter of insurance that its destruction might be reasonably expected to impair the value of his interest; it need not be a property interest, for an interest to be insurable does not depend necessarily upon ownership; it may be a qualified or limited ownership disconnected from any title, lien or possession. It is sufficient that the insured shall have a direct pecuniary interest in the preservation of the property, so that he will suffer loss by its destruction, or will be deprived of its possession or of profit therefrom; or of its security or other benefits dependent on the continued existence of such property.

While all writers concede that there must exist an insurable interest it is not easy to give an exact definition of this term, although it was thus attempted in the Civil Code of California (Sec. 2536 Code in force 1906): "Every interest in property or any relation thereto or liability in respect thereof, of such a nature that a contemplated peril might directly damnify the insured, is an insurable interest." This statement, however, includes several words of uncertain meaning and therefore it will not be of great aid in difficult and doubtful cases. What constitutes an insurable interest in a general sense, is well understood, but its exact meaning in border cases has been discussed and expounded by judges and writers from early times. (*Lucena v. Crauford*, 1802, 3 B. & P. 75). In brief, there must be a real interest, the value of which will be impaired by its destruction; and that interest must have a legal or equitable basis, as distinguished from a mere hope or expectation. It is not necessary that the interest is such that the event insured against would necessarily subject the insured to loss; it is sufficient that it might do so, and that pecuniary injury would be the natural conclusion (*Cone v. Niagara Fire Ins. Co.* 60 N. Y. 619).

The authorities indicate the tendency of courts to relax the stringency of the earlier cases, and to apply a more liberal rule in the determination of an insurable interest. An administrator of an insolvent estate, who acquires no title to or interest in real estate, has an insurable interest in buildings belonging to the estate, by reason of the possibility of enforcing claims of creditors against the real property (*Herkimer v. Rice*, 27 N. Y. 163); and a creditor of an estate of a decedent whose personalty was insufficient to pay debts was held to have an insurable interest in buildings from the destruction of which loss would ensue to the creditor (*Rohrbach v.*

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Germania Fire Ins. Co. 62 N. Y. 47). Ordinarily a judgment creditor by reason of his lien on the judgment debtor's property, has no insurable interest therein (*Spare v. Home Mut. Ins. Co.* 15 Fed. 707), as a judgment, differing from a mortgage, effects a general and not a specific lien on property. But when a mortgagor sells the land and building thereon, he still retains an interest in the preservation of the building in order that his debt may be paid, and therefore he has an insurable interest and may hold insurance on the building (*Waring v. Loder*, 53 N. Y. 581).

The amount of interest or its character is not material in determining the question of insurable interest (*Insurance Co. v. Stinson*, 103 U. S. 25). Thus a stockholder in a corporation has no legal title to the corporate assets, but he has rights of a pecuniary nature which may be prejudiced by the destruction of the corporate property; in a case where that academic question was decided the measure of damages was said to be the actual loss, to be ascertained by proof, but the court was not called upon to determine the extent of recovery (*Riggs v. Commercial Mutual Ins. Co.* 125 N. Y. 7). And a person interested in royalties payable for the privilege of using his patents where the amount of royalties was to be diminished in the event of the destruction of the insured property by fire, has an insurable interest in the property (*National Filtering Oil Co. v. Citizens Ins. Co.* 106 N. Y. 535); and so has the owner of unused revenue stamps, which were redeemable from the government, if lost (*U. S. v. American Tobacco Co.* 166 U. S. 468).

The general rule is that the insured must have an insurable interest in the property both at the time the policy is issued and at the time of loss. The necessities of business, however, have brought about a more reasonable doctrine, and a policy upon property in which the insured has no interest at the time of issuance is not a wager, if he acquires an interest during the life of the policy and retains it at the time of loss. So that a policy covering fluctuating stock or goods acquired from time to time during the term of the policy is valid (*Hooper v. Hudson River Fire Ins. Co.* 17 N. Y. 424; *Wolfe v. Security Fire Ins. Co.* 39 N. Y. 49).

A policy covering shifting stock has been upheld upon the theory of the suspension of the contract of insurance. It seems more logical to say that an agreement is implied for the substitution of similar property, especially in view of the alienation clause. It is, of course, the intent of the parties that property may be sold and replaced and that the subject of insurance may consist of any

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similar property answering the description at the time of the fire. If such is the intention there is no legal objection; and any other construction of a policy covering stock in trade continually changing would render it worthless as an indemnity (*Hoffman v. Aetna Fire Ins. Co.* 32 N. Y. 405).

The insured need not disclose the nature of his ownership or interest, but in accepting the policy he now warrants that his interest in the property covered by the policy is that of sole and unconditional owner (*Lasher v. St. Joseph F. & M. Ins. Co.* 86 N. Y. 423). The well settled distinction between representations and warranties was appreciated by the framers of the standard policy, and the insured accepts an owner's policy at his peril. No inquiry is necessary and the insurer may assume that the insured is the sole and unconditional owner unless otherwise stated in the policy. The clause is a condition precedent at the inception of the contract, and if not performed renders the policy void.

The warranty as to the character of ownership is affirmative, relating to the state of facts existing at the commencement of the risk; the warranty as to change of interest is promissory and applicable to conditions arising during the term of insurance. These conditions were wisely made warranties to overcome the tendency of courts to relieve the insured from forfeitures. A false statement or representation and its materiality are generally questions of fact; while a warranty, whether material or not, is expressly agreed to be true. A representation may be equitably or substantially answered; but a warranty must be strictly complied with (*Donley v. Glens Falls Ins. Co.* 184 N. Y. 107).

This condition as to ownership makes it possible to accept risks promptly, with the knowledge on the part of the insurer that a loss will fall exclusively upon the applicant, and that the insurer will be apprised of any fact which qualifies or limits this interest (*Weed v. L. & L. Fire Ins. Co.* 116 N. Y. 106; *Hunt v. Springfield F. & M. Ins. Co.* 196 U. S. 47).

The provision is not to be construed in a technical sense. It requires that the insured shall be the actual and substantial owner whether the title is legal or equitable. To be unconditional and sole the interest must be entirely vested in the insured, not conditional or contingent; nor for life or years, or in common with others; but the interest must be such that the entire loss in the event of destruction falls upon the insured. It has been tersely said that own-

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ership is sole when no one but the insured has any interest in the property, and it is unconditional when the quality of the estate is not limited in any way.

Thus, in the absence of any disclosure, the insurer can rely upon the agreement of an applicant as to ownership; an owner is naturally most alert to avoid a loss, and the physical and moral hazard may be fairly estimated from his character and methods of business. Here enters the important personal element, always recognized, and plainly adopted in the standard clause. If the risk is accepted, then during the life of the policy the Company knows that the insured is covered as an owner only; the policy makes provision equally plain that it shall become void if such owner subsequently permits any change whereby his interest becomes less than that of sole ownership, or if he attempts to give a stranger the benefit of the contract.

A common method of relieving the insured from the warranty as to ownership is by adding the words "as interest may appear." This means what is clearly implied, and whatever interest the insured may personally own in the subject matter of the insurance is covered and he can recover a loss to his particular interest, although it is less than unconditional and sole ownership; the clause in the policy is superseded by this broader phrase (*Dakin v. Liverpool, L. & G. Ins. Co.* 77 N. Y. 600). This provision is often useful in preventing a breach which otherwise would occur by reason of facts known to all parties, and it does not introduce the dangers attendant upon the use of the so-called commission clause, to which brief reference will be made later.

The insured having warranted that he is the unconditional and sole owner of the property also agrees that any change in interest, title or possession in the subject of insurance shall render the policy void; plain as this language seems, it is frequently perplexing to determine what is such a change.

The language in which the alienation clause was previously incorporated in policies was rarely uniform, and this gave rise to various decisions depending upon the particular phraseology adopted (*Abstract of forms and decisions*, May on Insurance, 4th Ed. page 575). In reviewing the authorities passing on this clause, it is therefore necessary to consider the exact words used in each case.

The reason of the rule that the alienation of property works a forfeiture, is based on the want of an insurable interest at the time

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of loss. An absolute sale of the subject of insurance illustrates the simplest and most obvious instance of alienation.

In construing clauses in the earlier policies which prohibit a sale in general terms, it was held that to work a forfeiture there must be a transfer of the entire interest of the insured, and that if the insured retained any insurable interest, he will be protected by the policy (*Hitchcock v. N. W. Ins. Co.* 26 N. Y. 68). The condition in the present policy against a change would be violated by a transfer of a partial interest (*Savage v. Howard Ins. Co.* 52 N. Y. 502; *Cooley on Insurance*, page 1732).

An assignment by the insured for the benefit of his creditors effects such a change in ownership of the subject of insurance as will render the policy void (*Northam v. Dutchess Co. Mut. Ins. Co.* 166 N. Y. 319; reversing s. c. 51 App. Div. 618); but whether the mere appointment of a receiver in bankruptcy, following an adjudication against the insured, effects a change in title, interest or possession, does not seem to have been settled. In such case the insured remains the owner of the property, and it has been said that the appointment of a receiver tended to add to, rather than diminish the care and oversight of the insured property; it has been held in an action to dissolve a partnership that the appointment of one of the co-partners as a receiver, works no change, for the exclusive control is merely given to one of the firm. The trend of the decision indicates that until the appointment of a trustee in bankruptcy no change occurs (*Fuller v. Jameson*, 98 App. Div. 53; s. c. affirmed 184 N. Y. 605; *Perry v. Lorillard Fire Ins. Co.* 61 N. Y. 214; *Keeney v. Home Ins. Co.* 71 N. Y. 396).

An assignment of the policy by the insured as a pledge for a debt is not a breach of the condition against an assignment of the policy before a loss, for the reason that no interest in the insured property was transferred, and the assignment which the policy prohibits is held to be in connection with the events which affect ownership; without such an interest the assignment would be inoperative, and the policy would not be void, but of no value (*Griffey v. N. Y. Central Ins. Co.* 100 N. Y. 417). And so a deed absolute in form, but in fact given simply as security for debt, is a mortgage only, under which title does not pass in law, and therefore the policy is not invalidated (*Barry v. Hamburg-Bremen Fire Ins. Co.* 110 N. Y. 1).

A sale upon execution of real estate before the expiration of the period allowed for redemption does not work a change of title

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or interest (*Wood v. American Fire Ins. Co.* 149 N. Y. 382). It would seem that the issuing of an execution and a levy thereunder on personal property of the insured would operate as a change of possession, but the law is to the contrary; to reach this conclusion, the clause that a policy shall not be invalidated by a "change of occupants without increase of hazard" was invoked by the court. That clause seems applicable to real property only, but it has been held to relate to a policy on personal property as well. Thus the store in which goods are kept is said to be the important element in the risk, and that insurance on personal property in that place is not affected by a change of occupancy unless by such change the risk has become more hazardous. When a sheriff levied on goods in a store a change of possession certainly appears to have taken place, but our highest court, by a vote of four to three, worked out a contrary result, holding that the taking possession by the sheriff did not alone avoid the policy; in saying that the provision should not receive a harsh or narrow construction the court apparently considered the interests of one of the parties only, for the decision was rendered in spite of the really illuminating fact as to moral hazard, that a fire destroyed the goods the day after the levy (*Walradt v. Phoenix Ins. Co.* 136 N. Y. 375).

An addition to a building had been condemned as a public nuisance; its removal had been ordered and the owner agreed to take it down several months before a fire occurred; the insurer claimed that legal process or voluntary act of the insured had effected such changes in the interest, title or possession of the structure as to vitiate the insurance, but this contention was overruled, and the insured recovered the value of the structure although the fire may have resulted in a practical benefit (*Irwin v. Westchester Fire Ins. Co.* 199 N. Y. 550, affirming s. c. 58 Misc. 441).

The interest of the insured is held to be changed if a firm takes in a new partner (*Germania Fire Ins. Co. v. Home Ins. Co.* 144 N. Y. 195); but there is no change if one partner retires from the firm, as a policy is not affected by a transfer between the parties insured. In such case there is no decrease in the value of the interest of the insured, and no new personal element is introduced; the insured continues to have no less interest to watch and guard the property, and thus the spirit and intention of the clause to prevent a greater moral hazard are preserved (*Hoffman v. Aetna Fire Ins. Co.* 32 N. Y. 405; *Rosenstein v. Traders Ins. Co.* 79 App. Div. 481).

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A sale in foreclosure does not violate the alienation clause for the reason that there is no change of title until the delivery of a deed (*Haight v. Continental Ins. Co.* 92 N. Y. 51). Nor is an executory contract for the sale of property, without change of possession, a breach of the policy condition, which is intended to apply only to such a transfer which divests the insured of title to, or control over the property (*Browning v. Home Ins. Co.* 71 N. Y. 508; *Wood v. American Fire Ins. Co.* 149 N. Y. 382; *Tiemann v. Citizens Ins. Co.* 76 App. Div. 5; *O'Neil v. Franklin Fire Ins. Co.* 159 App. Div. 313). And where a building is destroyed by fire between the making of the ordinary contract of sale of real property, and the delivery of the deed, the loss usually falls upon the vendor (*Goldman v. Rosenberg*, 116 N. Y. 78; *Listman v. Hickey*, 65 Hun. 8; affirmed 143 N. Y. 630).

But where the vendee is let into possession under such a contract, there is a breach of the condition. The test is said to be whether the vendor has parted with the absolute control and dominion over the subject of insurance, and where a formal delivery of the deed was delayed for convenience only, such a vendee becomes an equitable owner and liable for any loss (*Sewell v. Underhill*, 197 N. Y. 168; affirming s. c. 127 App. Div. 92); and the vendor in such case cannot enforce his insurance because there has been a change of title or possession (*Sewell v. Home Ins. Co.* 131 App. Div. 131). A change in interest may occur without change of title, for the word interest is broader than title, and embraces both legal and equitable rights (*Brighton Beach Racing Assn. v. Home Insurance Co.* 113 App. Div. 728; affirmed without opinion, 189 N. Y. 526).

A colorable transfer to defeat the claims of creditors is effective at least for some purposes, and therefore such a transfer would invalidate the policy; but a transfer without consideration and with no act of the parties thereunder, and without an intention to have it effective is analogous to an unexecuted gift and therefore is without legal effect, and the policy is not avoided (*Rosenstein v. Traders Ins. Co.* 79 App. Div. 481; s. c. 102 App. Div. 147; s. c. 112 App. Div. 902; affirmed 188 N. Y. 639; *Foward v. Continental Ins. Co.* 142 N. Y. 382). The cases in which this question was presented do not discuss the legal principles but rather their application to facts which were presented in a varying light in accordance with the flexible conscience of an interested party.

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A passing of property by death or by the will of the insured was formerly held to be such a change of interest as avoided the policy, so that the clause in the present policy properly provides that the policy shall not be affected by such a change (*Sherwood v. Agricultural Ins. Co.* 73 N. Y. 447; *Matter of Hine v. Woolworth*, 93 N. Y. 75).

A review of these principles shows that the standard policy was drawn with full and precise regard to their application when a loss occurs; all the safeguards, however, thus provided, may be superseded by a few words in a special form attached. While, in general, a policy is personal, enuring only in favor of the particular individual named, still, through him many interests may be covered under forms which have become popular in changing the application of a simple contract to make good or indemnify.

It is well understood that the warranty of ownership is waived by covering the interest of the insured as it may appear; and also that interests other than those of the insured may be covered by attaching the commission clause covering the insured on goods his own or held in trust or otherwise. It is, however, exceedingly difficult to determine the extent to which some of these general forms may extend the liability of the insurer, and it is important that the legal effect of them be clearly understood; one cannot safely act upon general principles without a full understanding of the operation of the common clauses which are not a part of the standard form. A discussion of the commission clause involves many perplexing questions, and a presentation of that subject is to be made to this Society by one who is peculiarly well qualified for the task. A brief reference to this undefined interest of unknown parties will emphasize the importance of securing a determination on debatable forms so that the rights of both parties may be known in advance of the assumption of risks.

With an insured of known character and principles, the interests of strangers in property in his possession or under his control may be covered without undue moral hazard; any claim must be presented by and adjusted with that individual, and the Company, through him, is safeguarded against fraud or imposition either before or after a loss. It is common for merchants to leave goods with a manufacturer, or bailee, but generally at owner's risk of fire; but if a bailee undertakes to insure the property of the bailors there is no longer any question of his right to collect in their behalf (*Stillwell v. Staples*, 19 N. Y. 401; *Lee v. Adsit*, 37 N. Y. 78;

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Waring v. Indemnity Fire Ins. Co. 45 N. Y. 606; Symmers v. Carroll 207 N. Y. 632; Home Ins. Co. v. Baltimore Warehouse Co. 93 U. S. 527; Cal. Ins. Co. v. Union Compress Co. 133 U. S. 387).

It is not essential that the person to be insured should be named in the policy and if a company is willing to write a policy without designating the parties insured, it acquiesces in accepting a risk on interests of unknown owners, and must accept all the consequences. But an unfortunate and seemingly illogical decision was made in construing a policy covering property of a firm under the usual commission clause. The insured rejected a quantity of beans which by agreement they held for the owner pending a re-sale. After a fire payment was made to the insured in accordance with an agreement adjusting the loss, but the insured made no claim for the loss on the beans not owned by them. Thereupon this apparent stranger to the contract brought a direct action against the insurer, disregarding its previous settlement and the cancellation of policies on payment, and a recovery was permitted. This seems to be the only authoritative decision in this State where the court upheld the right of a stranger to such form of contract, to maintain an independent action. The opinion does not discuss fully the principles of law, but if that decision is sound, it is as dangerous to issue a policy with the commission clause as to insure "for account of whom it may concern." (Utica Canning Co. v. Home Ins. Co. 132 App. Div. 420; Czerweny v. Nat. Fire Ins. Co. 139 N. Y. Suppl. 345, App. Term Jan. 1913).

It is not believed that the Court of Appeals will uphold the doctrine of this decision, but it will have great weight in the lower courts so long as it remains unreserved; that case well illustrates the serious consequences of inconclusive litigation involving a question of general import, and renders uncertain and harmful a common and useful form. (But see, *Burke v. Continental Ins. Co.* 184 N. Y. 77). When insuring the interest of strangers to the contract we must understand the broadest and most inadvisable form, covering for account of whom it may concern. This is freely used in marine insurance, but it has no place in fire insurance contracts. An inappropriate use of this form may practically destroy the protection of well settled legal principles and may open up a limitless field of litigation, in unexpected jurisdictions, and by unknown claimants.

A consideration of the subject of this paper may be helpful in reviewing the many and varying claims which arise in practice, but

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without a complete understanding of the modifications which follow from the varying forms so freely adopted, one may soon become bewildered by legal problems which still await final adjudication.

The greatest laxity and consequent danger to the insurer may be found in the indiscriminate use of forms devised by zealous brokers to cover a risk not within the contemplation of the company. The form becomes an essential part of the contract, and the company should not invite a controversy by accepting language of doubtful meaning (see "Forms" from Standpoint of the Company, by W. N. Bament, and from Standpoint of the Broker, by Julian Lucas, Jr.; papers of The Insurance Society of New York, 1912). The special clause attached governs the contract, and when inconsistent with the general conditions of the policy that which is more favorable to the insured will apply (*Michael v. Prussian Nat. Ins. Co.* 171 N. Y. 25, 33).

The broker owes a legal duty to his principal and he must have the requisite knowledge and skill to effect the indemnity required in each case (*Burges v. Jackson*, 162 N. Y. 632, affirming s. c. 18 App. Div. 296; *Fries-Breslin Co. v. Bergen*, 176 Fed. Rep. 76); but he owes no legal duty to the insurer other than to use good faith; here, as in other relations, the broker sometimes occupies an equivocal position between a desire to retain the good will of the insurer and his obligation to guard the interests of his principal.

So far as possible insurer should adhere to general principles and avoid the use of ambiguous or unnecessary words, and every effort should be exercised to eliminate uncertainty. When, however, the meaning is doubtful, it is wise to procure judicial interpretation so that language of common use may be adopted without misunderstanding. The rule of expediency carries far in all affairs, and experienced adjusters have decried the trouble and anxiety occasioned by doubtful phraseology, while timorous about seeking a decision which will forever settle the doubt, but which will also eliminate a forceful and persuasive argument to present to a stubborn or unreasonable claimant.

The courts are not fossilized; they reflect the spirit of the times and endeavor to mould relief to new conditions. Legislatures are apt to adopt current opinions, without adequate reflection, just as the populace would hastily recall a judge, not because of an improper pronouncement but because of an unpopular decision. Chance is of necessity an incident to the business, but it should not be permitted to overshadow conservatism and adherence to primary

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purposes and principles. The original purpose is often obscured or lost in an effort to subserve convenience and to facilitate the issuance of contracts which may be of greater import than either party appreciates. While litigation is to be deprecated, except when inevitable, it furnishes a far better remedy than a compromise with principle; a question settled for all time is of lasting value, while a compromise may settle a particular case and leave the doubt for continuing debate by parties and counsel.

It is to be hoped that this Society will advocate greater unanimity in insurance law, and a uniform policy to be used in all the states. It may even be advisable to consider a revision of clauses not now in the Standard Policy, for it seems important to take these clauses, as well as the main policy, outside the realm of legal debate. The application of the law depends so greatly on language that we emphasize the importance of special forms, because it is common experience that the best laid plans may be frustrated by inattention to seeming trifles. With the lapse of time nothing is more certain than that some of our present views will change, and that indeed is the best proof of progress. But principles of law become firmly settled and a review of some of the recent decisions in this State plainly shows that many of the legal controversies have arisen from a departure from established rules, and much of this litigation should not have been necessary. In conclusion we may quote the most recent expression of our highest court referring to the form of policy: "Insurance contracts above all others should be clear and explicit in their terms. In a word, they should be so plain and unambiguous that men of average intelligence who invest in these contracts may know and understand their meaning and import." (*Paskusz v. Phila. Cas. Co.* 213 N. Y. 22).

IX
NON-LIABILITY MATTER

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It may be well at the outset to divide and discuss in their respective order the provisions of the policy to which I am expected to address myself. They are as follows:

First: That the insurer shall not be liable for loss caused directly or indirectly by order of any civil authority.

Second: The insurer shall not be liable for loss by explosion of any kind unless fire ensues, and in that event, for the damage by fire only.

Third: If the subject of insurance is a building, and it or any part thereof fall, except as the result of fire, all insurance on such building or its contents shall immediately cease.

Fourth: The insurer shall not be liable for loss occasioned by ordinance or law regulating the construction or repair of the building in question.

FIRST.

LOSS BY ORDER OF CIVIL AUTHORITY.

The situation existing prior to the insertion of the provision against loss caused by civil authority, may be readily understood by perusal of the case of *City Fire Ins. Co. v. Corlies*, 21 Wendell (N. Y.) 367.

In this case, the action was on a policy which insured the plaintiff against loss or damage by fire on certain earthenware in crates contained in a brick, slated store at No. 75 Pearl Street, New York.

On the trial, it appeared that in the great fire on the morning of December 17th, 1835, the store No. 75 Pearl Street was blown up with gunpowder and the goods insured totally destroyed. The explosion was ordered by the Mayor of the City to arrest the progress of a fire then raging to the east of this store. The building next to the store, but not the store itself, was on fire at the time of the explosion and the buildings all around this store in every direction took fire and were more or less burned or totally destroyed by the course of the flames; and according to every probability, the fire would have destroyed the store in question with its contents, had it not been blown up.

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The defendant moved to dismiss the plaintiff's complaint on each of the following grounds:

(1) That the loss did not arise from a cause contemplated by the policy, but was a remote consequence of the fire not necessarily arising from it.

(2) The mere fact of bringing gunpowder upon the premises suspended the policy, although deposited without the knowledge of the plaintiff.

(3) A loss by explosion of gunpowder cannot be said to be a loss by fire, and those cases in which a recovery can be had where the goods have been destroyed not by fire, but by water or by breakage or the consequences of the fire, are cases where the injury arose in the attempt to save the goods insured; here the goods insured were intentionally destroyed to save the property of others.

(4) The act was done by the Mayor by virtue of his office for the benefit of the citizens at large, and the corporation of the City is liable for his acts even at common law independently of the statute; if he had no authority, then his own was an usurped power, which is expressly excepted by the policy.

(5) This fire was a general calamity, and property destroyed to put an end to it should be a general tax on the citizens and not a partial one on this insurance company; and in a doubtful case a policy should be so construed as to lay a general rather than a partial contribution.

The learned Court with the foregoing questions before it and speaking through Mr. Justice Bronson, said:

There has, I think, been a loss by the peril insured against, within the meaning of the policy. In *Grim v. Ins. Co.*, 13 Johns, 451, no doubt seems to have been entertained, either by the court or counsel, that a loss by the explosion of gunpowder was a loss by fire. And in *Waters v. Ins. Co.*, 11 Pet. 213, the point was so adjudged. The court was of the opinion that fire was the proximate cause of the loss.

II. According to the terms of the policy, if the building was used for the purpose of storing gunpowder, the contract was, for the time, suspended. And see *Duncan v. Ins. Co.*, 6 Wend., 488. But placing gunpowder with a lighted match in the building, for the express purpose of producing an explosion, which immediately followed, was a very different thing from what the parties contemplated when they inserted this provision in the contract. Whether the insurers are liable for this voluntary destruction of the property, is a question yet to be considered. But I think it quite clear that they have not established the allegation that the building was used for the storing of gunpowder.

III. The building containing the goods was destroyed by order of the mayor of the city, for the purpose of arresting the progress of a conflagration. Are the insurers answerable for this voluntary destruction of the property? This question has been presented in a double form—the one supposing that the mayor acted with and the other that he acted without authority.

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1. Let us first assume that the mayor acted illegally. If the fire had been kindled by an incendiary, it is not denied that the insurers would be answerable. Why are they not then answerable, if the mayor acted without authority? The act, though not done for a wicked purpose, was as illegal as though it had been the work of a felon. The answer attempted is, that although the mayor had no authority, yet as he acted *colore officii*, this is a case of loss happening by means of usurped power, which is expressly excepted by the policy.

It is impossible to maintain that a mere excess of jurisdiction by a lawful magistrate, is the exercise of an usurped power within the meaning of this contract. That is not what the insurers had in mind when they made the exception. It was an usurpation of the power of government against which they intended to protect themselves. Such was the interpretation given to the same words in a policy as early as the year 1767. *Drinkwater v. London Assur.*, v. 2 Wils., 363. The property insured was destroyed by a mob, which arose on account of the high price of provisions; and the insurers were held liable, notwithstanding a proviso in the policy that they would not answer for a destruction by "usurped power." Bathurst, J., said those words, according to the true import thereof and the meaning of the parties, could only mean an invasion of the Kingdom by foreign enemies to give laws and usurp the government, or an internal armed force in rebellion, assuming the power of government, by making laws, and punishing for not obeying those laws, *Wilmot, Ch. J.*, said the words meant an invasion from abroad, or an internal rebellion, when armies are employed to support it; when the laws are dormant and silent, and the firing of towns is unavoidable. In *Langdale v. Mason*, 2 Marsh. Ins., 791, it was said by *Ld. Mansfield*, that these words were ambiguous, but they had been the subject of judicial determination; that they must mean rebellion conducted by authority—determined rebellion, with generals who could give orders. And he added: "usurped power takes in rebellion, acting under usurped authority." Whatever doubt there may have been originally about the meaning of the words "usurped power," in a policy, their legal import had been settled long before this contract was made; and we cannot assume that these parties used the words in any other than their legal sense.

2. But the mayor acted under lawful authority; there was no usurpation of any kind. Whether he had the concurrence of two aldermen, as the statute provides, or not, there can be no doubt of his common law power, as the chief magistrate of the city, to destroy buildings, in a case of necessity, to prevent the spreading of a fire. Indeed, the same thing may now be done by any magistrate, or even by a citizen without official authority. *Mayor of N. Y. v. Lord*, 17 Wend., 285.

IV. If the mayor acted by lawful authority, it is then said that the property was destroyed for the benefit of the city, and that the Corporation (not the insurers) must bear the loss. This case does not fall within the statute charging certain losses on the city, because it does not appear that the mayor had "the consent and concurrence of any two aldermen," 2 R. L., 368, sec. 81; and for the further reason, that the property would have been consumed by fire if its destruction had not been ordered by the magistrate. *Mayor of N. Y. v. Lord*, 17 Wend., 285. It is said that the Corporation is liable at the common law for the acts of the mayor; but no authority was cited in support of the position, and I am not prepared to say that, in a case like this, the doctrine can be maintained. The inclination of my mind is strongly the other way.

But suppose the city is liable, I do not see how that fact can affect this contract. If the insurers pay the loss they may, perhaps, have an action against the corporation of the city, in the name of the assured, to recover back the money. *Mason v. Sainsbury*, 2 Marsh. Ins. 794; S. C., 3 Doug. 61. But however that may be, the fact that the assured may have a remedy against the city, cannot change or qualify the undertakings of the insurers.

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This leads me to notice a little more particularly the extent of the contract. The company agrees to make good unto the assured all such loss or damage to the property as shall happen by fire. Thus far there is no limit or qualification of the undertaking. If the loss happen by fire, unless there was fraud on the part of the assured, which is not pretended in this case, it matters not how the flame was kindled. Whether it be the result of accident or design—whether the torch be applied by the honest magistrate or the wicked incendiary—whether the purpose was to save a city, as at N. Y., or a country, as at Moscow—the loss is equally within the terms of the contract. That the insurers intended the general undertaking should extend to every possible loss by fire, is evident from the fact that they afterwards proceed to specify particular losses by fire for which they will not be answerable. *Ins. Co. v. Lawrence*, 10 Pet. 507. The exceptions are contained in the sixth condition of the proposals annexed to the policy. It is unnecessary to recite the clause, because it is not pretended that this case comes within any of the exceptions, save that relating to a loss happening by means of “usurped power,” and that point has already been considered.

There has then been a loss by fire. The case falls within the general undertaking of the insurers, and is not affected by any of the exceptions which they thought proper to make to the extent of their liability. We cannot add another exception. The insurers are bound by their contract.

The foregoing authority has been accepted throughout substantially the whole of the United States as correctly defining the law on the questions there at issue. One illustration is the case of:

PORTSMOUTH INS. CO. v. REYNOLDS,

9 Ins. L. J. 606.

Mr. Justice Burks speaking for the Supreme Court of Appeals of Virginia, said:

The general undertaking extends to all loss by fire from whatever cause, unless occasioned by the fraud or design of the insured. As was said by Judge Bronson in *City Fire Ins. Co. v. Corlies*, 21 Wen. 367, the company agrees to make good unto the assured all such loss or damage to the property as shall happen by fire.

Thus far there is no limit or qualification of the undertaking. If the loss happen by fire, unless there was fraud on the part of the assured, it matters not how the flame was kindled, whether it be the result of accident or design, whether the torch be applied by the honest magistrate or the wicked incendiary, whether the purpose was to save a city, as at New York, or a country, as at Moscow, the loss is equally within the terms of the contract. That the insurers intended the general engagement should extend to every possible loss by fire is evident from the fact that they afterwards proceed to specify particular losses by fire for which they will not be answerable. See also *Ins. Co. of Alexandria v. Lawrence*, 10 Peters, pp. 517-518.

To meet the construction thus given to the insurance contract referred to, and to obviate the situation that was thus created, there was inserted in policies subsequently written in one form or another, the provision now contained in the standard form of policy of this State, which is intended to and does relieve the insurer from loss under similar circumstances, and I do not find that the validity of the clause in question has been successfully questioned. Indeed, it has been sustained in the case of

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CONNER v. MANCHESTER ASSUR. CO.,
33 Ins. L. J. 844.

In this case, Chief Justice Gilbert, speaking for the United States Circuit Court of Appeals in the 9th Circuit, said:

It is contended, further, that the property was not directly or indirectly destroyed by order of civil authority; that there was no law authorizing the supervisors of a county to destroy the property of the citizens thereof; and that the property of the plaintiffs in error was destroyed by accident or neglect, and without their fault. The record of the findings of the trial court shows that the fact was established that the fire was started under an order of the supervisors of the county. The statutes of California of 1897 (pp. 465, 466, c. 277) confer authority upon the supervisors of a county to provide for the destruction of insects injurious to fruit trees, vines or plants, and to make and enforce local police, sanitary and other regulations not in conflict with general laws. But whether or not there was lawful authority to start the fire which indirectly caused the damage in this case, there was de facto authority. The order was, in fact, made, and made by the officers to whom the said powers were given, and thereby the loss occurred. This, we think, excuses the insurance company: *Barton v. Home Ins. Co.*, 42 Mo. 156. The facts that the loss was the result of a fire started on other property, and that the property of the plaintiffs in error was not ordered to be burned, do not render the exemptions of the policy inapplicable. There was but one fire. It was ordered by civil authority. It indirectly caused the loss, and there was no intervening cause: *Insurance Co. v. Boon*, 95 U. S. 117; *Grand Trunk R. R. Co. v. Richardson*, 91 U. S. 454; *Krippner v. Biehl*, 28 Minn. 139.

It is also interesting to note that in the case of

HOCKING v. BRITISH AM. ASSUR. CO.,
40 Ins. L. J. 799,

Mr. Justice Gose, speaking for the Supreme Court of Washington, says, that the word "indirectly" was not limited in its application to "invasion, insurrection, riot, civil war or commotion," but was equally applicable to a loss caused by "order of any civil authority." In discussing this phase of the case then under consideration, the learned Justice said:

It bases its exemption upon the following facts: The insured died of smallpox the day preceding the fire, and was removed from the house for burial about one hour before the fire occurred. The fire resulted from a fumigation of the house ordered by the board of health. At the close of plaintiff's testimony, a judgment of non-suit was entered. The plaintiff has appealed.

The appellant first contends that the word "indirectly" has reference only to the causes preceding the phrase "or by order of any civil authority;" that this is made plain by the use of the word "by" in the phrase last quoted, and that the exemption in that clause is available only in case of loss occurring "directly" by order of some civil authority. It is also said that the clause "or by theft" gives support to this view. We think that such a construction would do violence to the language which the parties have seen fit to use, and that it would be also a strained and unnatural interpretation of their meaning. As was said in *Insurance Co. v. Boon*, 95 U. S. 117, 24 L. Ed. 395: "Policies of insurance, like other contracts, must receive a reasonable interpretation consonant with the apparent object and plain intent of the parties. This is

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entirely consistent with the rule that ambiguities should be construed most strongly against the underwriters and most favorably to the assured."

It is also contended that the proximate cause of the fire was the negligence of the health officer, and that the fire was not even the indirect result of the order of the board. It is argued that the exemption was only intended to apply to a case where the property is destroyed by some direct act of the civil authority to prevent the spread of fire or disease or such like. We think the contention is not sound. Putting aside refined distinctions, it is obvious that the preponderating or producing cause of the fire was the order of the board of health directing its inferior officers to fumigate the house. The civil authority put its own agency into operation, and the fire was the indirect result. There was no intervening cause. The proximate cause is the efficient cause, the one which puts the other causes into motion. *Conner v. Manchester Assur. Co.*, 130 Fed. 743, 65 C. C. A. 127, 70 L. R. A. 106, is in point. In that case the defendant had insured a crop of grain for the plaintiff against loss or damage by fire. By order of the board of supervisors of the county in which the insured property was situate, a fire was started in the grass upon certain pasture land at a point three or four miles distant from the land upon which the plaintiff's grain was situated, for the purpose of destroying grasshoppers and averting the disaster which their presence threatened. The fire got beyond control, spread to the plaintiffs' land and burned their grain. The policy contained a clause identical with the one under consideration. In applying it to the facts in the case, the court said: "The facts that the loss was the result of a fire started on other property, and that the property of the plaintiff in error was not ordered to be burned, do not render the exemptions of the policy inapplicable. There was but one fire. It was ordered by civil authority. It indirectly caused the loss, and there was no intervening cause"—citing *Insurance Co. v. Boon*, 95 U. S. 117, 24 L. Ed. 395; *Grand Trunk R. R. Co. v. Richardson*, 91 U. S. 454, 23 L. Ed. 356. See, also, *Barton v. Home Ins. Co.*, 42 Mo. 156, 97 Am. Dec. 329. The case of *Insurance Co. v. Boon*, supra, contains an exhaustive discussion of the principles applicable in stipulations like the one under consideration, and supports the view announced in the text.

Just how far the courts might go to sustain the clause in question where there was merely an assumption of "civil authority" as distinguished from real authority, offers a grave question, and I am inclined to assume that the burden would rest on the insurer to prove that those directing the act out of which the loss in question grew, had authority so to do.

In the case of

AMERICAN CENTRAL INS. CO. v. STEARN'S LUMBER CO.,
41 Ins. L. J. 125,

Chief Justice Hobson, speaking for the Court of Appeals of Kentucky, and discussing the question as to whether the direct or indirect destruction of the property insured by persons unauthorized, or in other words without "civil authority," but assuming to have such authority, would relieve the insurer from liability under its policy, said:

The house was burned by order of the marshal. The power of the marshal in such cases is thus defined by statute: "The marshals and

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their deputies shall have in each state the same powers in executing the laws of the United States as sheriffs and their deputies in such state may have by law in executing the laws thereof." U. S. Compiled Statutes 1901, §788.

The power of the sheriff in executing a criminal process is covered by section 4583 of the Kentucky Statutes, and section 40 of the Criminal Code: "In executing a writ of habeas corpus or any criminal or penal process requiring an actual arrest, the sheriff or other officer may break open the outer or any other door of the dwellings or other house of the defendant, or of any other person, if it be necessary to enable him to make the arrest." Ky. St. 4583 (Russell's St. §256.) "To make an arrest, an officer may break open the door of a house in which the defendant may be, after having demanded admittance and explained the purpose for which admittance is desired." Criminal Code, §40.

It will thus be seen that the marshal's power is the same as the sheriff's, and that neither is authorized to burn a building in making an arrest. In *Goodman v. Condo*, 12 Pa. Super. Ct. 466, the court had before it the liability of a sheriff, in a case like this, for burning down a house in which a felon was secreted, in order to arrest him. The court held the sheriff liable for the loss of the building. It said: "The sheriff in this case does not rely upon any law which required this particular act, causing the damage to be done, and prescribing the manner in which it should be done. He stands, therefore, just as any other resident of the village in which these occurrences happened would stand, so far as any right to destroy property is concerned. It is true it was his official duty to arrest the felon; but so was it the duty, though not official, of the resident to do the same thing. To enable him to perform his duty he has been clothed with ample power, for the whole posse comitatus is at his command. He may break open doors in order to follow felons, and if they are killed, provided they cannot be otherwise taken, it is justifiable, though if they kill him whilst he is endeavoring to arrest them it is murder. *Brooks v. Commonwealth*, 61 Pa. 352 (100 Am. Dec. 645). The law, since it has thus invested him with such ample power, has not gone further and authorized him to destroy property when such destruction simply removes somewhat of the danger involved in the performance of his duty. The arrest of a felon is always attended with some danger, but this is an incident of the office of sheriff. Its extent is reduced to a minimum by the great power given to him, but it is obvious that it cannot be removed entirely. This burned house did not threaten the life of the sheriff. It was the desperate man within it. It is true the house furnished some measure of protection to the man within, whilst accomplishing his lawless purpose; but its destruction can in no sense be said to have removed a danger which threatened the sheriff's life. So long as the lawless purpose existed, so long was there danger to the sheriff. It is evident, therefore, that the only purpose of destroying the house was to render the arrest less dangerous. In this respect it was simply an aid to, and in ease of the sheriff, and upon principle must be paid for by him. Where he incurs expense or inflicts damage for the purpose of aiding him in the performance of his duties, he is liable personally unless the law has provided otherwise. *Rausch v. Ward*, 44 Pa. 389."

The deputy marshal in the case before us had no more authority to set the house on fire than the sheriff in the case cited. The loss of the house was not due, directly or indirectly, to the order of any civil authority, for the marshal had no authority to burn the house. He was not a civil authority for this purpose. The rioters were in the house; the marshal's posse, acting under his orders, were not rioters. The loss of the house was not due, directly or indirectly, to the riot carried on by the men within the house. It was due directly to the wrongful act of the marshal in setting fire to the house without authority. The riot within

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the house was the occasion of his wrongful act, but the loss of the house was not the proximate result of their unlawful acts. The loss of the house was the direct result of another's unlawful act, which intervened between their act and the burning of the house. The unlawful act of the marshal in setting fire to the house was the cause of the loss. It necessarily follows that the insurance company was not released from liability by the clause of the policy above quoted.

The case of *American Central Ins. Co. vs. Stearn's Lumber Co.*, just quoted from, must however, be read in conjunction with the law as laid down in the case of *City Fire Ins. Co. vs. Corlies*, hereinbefore reviewed, where the court in meeting the charge that the Mayor of the City had had no authority to order the destruction of the building in question, said:

But the Mayor acted under lawful authority; there was no usurpation of any kind. Whether he had the concurrence of two aldermen, as the statute provides, or not, there can be no doubt of his common law power as the chief magistrate of the city to destroy buildings in case of necessity to prevent the spreading of a fire. Indeed, the same thing may be done by any magistrate or even by a citizen without official authority. *Mayor of N. Y. v. Lord*, 17 Wend. 285.

This phase of the question is not without its difficulties, but time will not permit me just now to discuss it further.

SECOND.

LOSS BY EXPLOSION.

The earliest policies contain no clause with reference to liability for losses from explosions, and as a rule it was then held that such a loss was not one for which the insurer was liable.

An exception was made, however, where the explosion was itself caused by fire.

And where the loss resulted partly from explosion and partly from combustion, it was held to be within the terms of a policy insuring against "loss or damage by fire."

13 Am. & Eng. Encyc. of Law, 132-133.

In the later policies, as in the standard form, the insurer against fire stipulates for exemption from liability from explosion. And in the great majority of cases where this clause has been under consideration, it has been upheld and a recovery from loss by explosion denied.

BRIGGS v. N. A., etc., INS. CO.,
53 N. Y. 446.

ST. JOHN v. AM. MUT. INS. CO.,
11 N. Y. 516.

STRONG v. SUN MUT. INS. CO.,
31 N. Y. 103.

EVANS v. COLUMBIAN INS. CO.,
44 N. Y. 146.

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There is a wealth of other authority to support the clause in question.

The case of

HUSTACE v. PHENIX INS. CO.,
175 N. Y. 292,

is now most frequently cited as an authority on the proposition now under consideration, but this decision must be taken with some caution for two reasons,—first, the plaintiff stipulated himself out of court by conceding that before ignition, the explosion in question “caused said building to fall and become a total loss,” and second, the clause in question as it appears in the standard form of policy, was apparently not correctly printed in the papers on appeal.

It is quite clear that when the insured stipulated, as he did, that his building had become a total loss by reason of the explosion in question before any fire occurred, he put himself out of court.

You will also find upon a careful perusal of the Hustace case, that the clause relating to the loss by explosion was printed in the papers on appeal with the punctuation so changed as to materially affect the construction that should be given thereto.

Chief Justice Parker, writing for the Court of Appeals, quoted the clause as it was apparently before him, in these words:

This company shall not be liable for loss caused directly or indirectly by invasion; insurrection; riot; civil war or commotion; military or usurped power; or by order of any civil authority; or by theft; or by negligence of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by a fire in neighboring premises; or (unless fire ensues and in that event for damages by fire only) by explosion of any kind; * * *

The clause, however, as contained in the standard form is as follows:

This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority; * * * or (unless fire ensues and in that event for the damage by fire only) by explosion * * *.

It will thus be readily observed that the semi-colons placed after the words “invasion,” “insurrection,” “riot,” “civil war or commotion” and “military or usurped power,” are errors that crept into the record. There should have been commas in place of semi-colons. As the court read the record, it held the words “directly or indirectly” applicable to loss by explosion as well as to loss caused by “invasion,” “insurrection,” “riot,” “civil war or commotion,” “military or usurped power,” “or by order of any civil authority.” Furthermore, as the court apparently read the record, the

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insurer was not liable for even the loss by fire that followed the explosion, although the policy itself clearly provides the contrary. By express words, the insurer is liable in case fire ensues for all damages caused by the fire in question. Such a loss is undoubtedly "indirectly" caused by the explosion, and the Court of Appeals apparently fell into error in so construing the policy as to make the word "indirectly" applicable to a loss by explosion.

The Hustace case, as all of you remember, grew out of the explosion in the Tarrant building on October 19th, 1900, and considerable litigation followed.

The attorney for Hustace, as I have before stated, stipulated himself out of court by conceding that his building was a total loss caused by the explosion before ignition, but other attorneys were not similarly caught, as evidenced by the result of the case of

EPPENS, SMITH & WIEMANN CO v. HARTFORD FIRE INS. CO.,
99 App. Div. 221.

In the case just cited, counsel for the assured raised the issue that the explosion in the Tarrant building caused the ignition of the Eppens, Smith & Weimann building, and that the loss therein was caused solely by fire. And further, that the fall of the building or such portions of it as fell, were the result of internal combustion.

The Eppens, Smith, Weimann case was very hotly contested and had a more or less varied career.

At the first trial had before the late Mr. Justice Amend, approximately thirty members of the Fire Department decked out in the full splendor of their uniforms, testified more or less consistently to the effect that immediately upon the happening of the explosion the Eppens, Smith, Weimann building, with others, immediately collapsed, and then followed some fire in the ruins. This testimony was met by about an equal number of civilian witnesses, and with the case in that shape it was after a trial lasting substantially a week, submitted to the jury who found for the defendant.

The learned court, however, at the instance of defendant's counsel, had charged the jury among other things, as follows:

That if the front or Warren street wall of the Fahys Building, or a substantial part thereof, was shattered before fire had consumed this property, the verdict must be for the defendant.

Immediately following the verdict of the jury and the entry of judgment thereon in defendant's favor, the insured took an appeal to the Appellate Division of the Supreme Court, First Depart-

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ment, where the judgment in question was reversed on the ground that the wall in question might well have been "shattered" and not yet "fall."

The Appellate Court therefore held that the charge to the jury by the learned Trial Judge to the effect that if the jury found that the wall had been "shattered" was reversible error and a new trial was ordered.

On the retrial of the case, which was before Mr. Justice Dowling, now of the Appellate Division, there was substantially the same conflict in testimony and the result was a disagreement of the jury.

Following the inability of the jury to agree, the case was submitted to Mr. Justice Dowling alone on the testimony taken before him and the jury; and after the submission of briefs, a decision was rendered in favor of the assured which was later affirmed by the Appellate Division and the Court of Appeals.

From the foregoing, it is clear that the provision in the standard policy which eliminates loss by explosion is valid and has been sustained by ample authority, but at the same time it is always imperiled by the assured raising the issue as to whether or not the loss was caused by the explosion or by fire accompanying or immediately following the same.

THE "FALL" CLAUSE.

As all of you are no doubt aware, the standard form of policy provides that the insurer shall not be liable under the following conditions:

If a building or any part thereof fall except as the result of fire, all insurance by this policy on such building or its contents, shall immediately cease.

The language used is clear and explicit, and in my opinion the clause is entirely valid and effective.

Its application, however, was questioned in the case of

LEONARD v. THE ORIENT INS. CO.

30 Ins. L. J. 980,

where Chief Justice Woods, speaking for the United States Circuit Court of Appeals in the Seventh Circuit, said:

In *Dows v. Insurance Co.* (127 Mass. 346), where the action was upon fire policies containing a clause concerning explosions like that in the policy before us, it was said, on the authority of *Scripture v. Insurance Co.* (10 Cush. 356) that, "the explosion in the upper story having been caused by fire, the insurers, if no clause had been inserted restricting their liability for losses by explosion, would have been liable for the losses, whether by the explosion or by the subsequent fire, to the amount of the insurance." One of the policies also contained the provision,

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"If a building shall fall, except as the result of fire, all insurance by this company on it or its contents shall immediately cease and determine."

in respect to which it was said:

"The question is whether this last provision is applicable to the facts of the case, and in the opinion of the majority of the judges, it is not. The provision, being introduced by the insurers and for their benefit, is, by a familiar rule, to be construed, in case of ambiguity, most strongly against them. It appears to us to have had in view the case of a building falling by reason of inherent defects, or by the withdrawal of the necessary support, as by digging away the underlying or adjacent soil. It might, perhaps, include the case of a building thrown down by a storm or flood or earthquake. But it would be construing this provision too liberally in favor of the insurers to hold it to include the case of the destruction of a building by an explosion within the building itself, and of a fire immediately ensuing upon and connected with such an explosion, the measure of the liability for which has been carefully and precisely defined in the previous provisions of the policy."

The fact that in the present case the explosion occurred outside of the building in which the insured goods were kept cannot affect the liability of the insurer, if otherwise liable, for the loss by fire which immediately ensued. If there had been no fall of the building or of any part of it, and the flame attending or ensuing upon the explosion had reached the insured goods through an open door or window, liability under the policy for the loss would be beyond dispute. Is it to be said that there is no liability simply because the first effect of the explosion was to break a passageway into the building for the fire, which, in a few moments, followed? Confessedly, there would be liability if the flame had entered through any opening, caused or not caused by the explosion, if no part of the building had fallen; but should there be no liability if a piece of glass falling from a window shattered by the explosion had given admission to the flames? The language of the contract is clear that if any part of the building shall fall, except as the result of fire, all insurance on building or contents "shall immediately cease." The words are surely, as they have been declared to be, "terse and expressive." They are unqualified and universal, admitting of neither interpretation nor construction, and, if applicable, it would seem, should be allowed their literal significance. It is not to be said that they are applicable, and yet not to be applied literally. It may not be said that "any part" of a building must be deemed to mean an important part, or such a part as might cause, or be supposed likely to cause, or at least to enhance the danger of, loss by fire. "It was competent for these parties to fix the terms of their agreement." Where they wrote and subscribed "any part," they must be presumed to have meant any part, great or small, if observable or readily discoverable. Even if it could be said that the part must be large enough to cause or to be likely to enter into the risk of loss by fire, the qualification could mean little, because conditions are readily supposable, and are not improbable, in which the fall of material of small weight or bulk would be enough to start a fire. Not much is necessary to overturn a stove or to scatter the fire of an open grate or hearth, and still less to ignite a match. If there had been a window on the west side of the building in question, the falling of a shutter or of a pane of glass would probably have been followed by the same loss to the plaintiff in error which ensued upon the falling of the corner of the building. On the theory of strict adherence to the meaning of plain words, these propositions cannot well be denied; and upon that theory the case of *Kiesel & Co. v. Sun Ins. Office of London* (31 C. C. A. 515) is urged upon our attention in support of the ruling below. The case, however, is not in point. The policy there in suit contained the clauses now under consideration; but, there having been no explosion, the building fell, and the goods insured were burned, and the question was

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whether the fall was caused by the fire or by a gale of wind. It is, perhaps, worth while, however, to observe that the literal significance of the contract seems to have been departed from when it was said in the opinion that if the building "was on fire, and if it would have fallen by force of the wind if there had been no fire, then its fall could not be said to have been the result of the fire, and the defendant was not liable." Any question of non sequitur in the statement aside, it is certainly not inconsistent with the express terms of the contract that in such a case the insurer should be liable for the damage done before the fall occurs, though not caused by the fire. The insurance ceases only at the instant of the fall, and it follows, on a strict construction, that "the cause of the fall" can be the test of liability only from that instant. The case before us is one of destruction by fire, which immediately followed, and with propriety may be said to have been caused by, an explosion. Whether that explosion was caused by fire, it is not necessary for the present purpose to consider. See *Briggs v. Insurance Co.*, 53 N. Y. 446. The liability of the insurance company for fire immediately ensuing upon an "explosion of any kind or lightning" was "carefully and precisely defined" in a clause devoted to the subject; and we agree with the opinion in *Dows v. Insurance Co.*, supra, that the succeeding clause, whatever its construction when applicable, should not be deemed "to include cases of destruction by explosion and by fire ensuing upon and immediately connected therewith." In this way the two clauses may well stand together, neither interfering with the legitimate office of the other; while if the latter is to be applied and enforced according to its literal meaning in every case where, by reason of an explosion, or otherwise, the building, or a part of it, falls just before or during a fire, which otherwise would be within the contract, it will lead to results which the parties to policies may not both be supposed to anticipate, and which the courts need not and should not prove.

The meaning and effect of the "fall" clause was well defined by Judge Lacombe, in *Western Assurance Co. vs. Mohlman*, 83 Fed. Rep. 811, where at page 819, he said:

What does this particular clause mean, "If a building, or any part thereof, fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease?" Manifestly, it does not merely provide that the insurer will not be liable for the particular variety of loss by fire which results from a fall. It stipulates for very much more, viz., that the contract, which it is expressly provided shall normally continue for a year, shall, in the event of a fall, absolutely cease and determine, so that if a fall shall take place which in no way injures the property insured and it be thereafter destroyed by fire happening otherwise than by fall or from prohibited causes, the insurer is, nevertheless, not liable, because an event has happened which, by agreement of the parties, put an end to the contract altogether.

In *Kiesel vs. Sun Insurance Office*, 88 Fed. Rep., 243, the Court, speaking through Judge Sanborn (p. 245) says:

No words occur to us more apt, terse and expressive than those contained in the policy with which to answer this question: "If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease." If the building falls before the goods insured are damaged by fire, and if the fall is not caused by fire, from that instant the insurance ceased.

The purpose of parties to an insurance policy in making their contract is to indemnify the insured against all destruction or damage caused by fire, but to give no indemnity against any destruction which resulted from other causes. Naturally the dominant thought throughout the entire agreement and hence the key to its interpretation and the

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measure of the liability of the company under it, is the cause of the destruction or damage. Generally speaking, if that cause is fire, there is liability. If fire is not the cause, there is no liability. In the particular clause in issue in this case the same purpose controls, the same key interprets, the same test determines the liability. If the fall of the building was caused by fire, then the defendant was liable, whether the goods insured were burned before or after the fall; but if the fall occurred before the fire attacked the goods, and if that fall was caused by an earthquake, by a waterspout, by a cyclone or by any other cause than fire, the express agreement was that, when the fall occurred, the insurance ceased and there was no liability, if the building was on fire, and if it would not have fallen without the fire, its fall might well be said to have been the result of the fire; but if it was on fire and if it would have fallen by the force of the wind, if there had been no fire, then its fall could not be said to have been the result of the fire, and the defendant was not liable.

In *Nelson vs. Traders Fire Insurance Co.*, 86 App. Div., 66, the east wall of the building, which was the east wall of a hotel, collapsed, causing the stores immediately above and some portion of the roof, or stories over the plaintiff's store to fall into the hotel premises. A fire started in the ruins and in attempting to extinguish it the insured property was damaged. The plaintiff's property was in no manner injured by the falling walls, and but for the fire they would have suffered no damage. It was held that the plaintiffs were not entitled to recover upon the policy.

At page 68, the Court said:

That the risk of fire is greatly increased by the collapse of a portion of a building is self-evident. In fact, in the case at bar, except for such collapse, no fire would have resulted and no damage would have been done to the plaintiff's property. But whether the falling of the building, or a part of it, did or did not increase the hazard, it is unimportant to inquire. The defendant had a right to provide that its liability should cease immediately upon the happening of such event, if its intention so to do was expressed in clear and unambiguous terms in the contract of insurance. We think such is the clear meaning of the language employed. "If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease." A part of the building in question fell, not as a result of fire, and the defendant simply asks that it be determined that all insurance by this policy (the policy in suit) on the contents of such building ceased immediately upon the falling of a substantial part of such building.

The Court then refers to the *Kiesel* case (88 Fed. Rep., 243, supra), and after approving of its doctrine, at page 271, concludes:

In the case at bar, a substantial part of the building in which the plaintiff's property was located fell, not as the result of fire, and by the express terms of the policy it is provided that thereupon the insurance upon such property which is a part of the contents of the building immediately ceased. We think a reasonable interpretation of the clause in the policy compels us to hold that immediately upon the falling of the east half of the building in question, the insurance upon plaintiffs' property ceased.

It is true that in the case of *Western Assurance Co. vs. Mohlmann Co.*, 83 Fed. R., 811, it was held that the burden of proof was

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upon the defendant to establish that the building fell by a cause other than fire, but the explosion clause of the standard policy was not in any way involved in that case. When, however, a case like the one now before the Court came before the United States Circuit Court Judge Wallace presiding, for decision, Judge Wallace distinctly and unequivocally ruled that the existence of the explosion clause changed the rule which had been adopted in the Mohlmann case, and that, when it, the explosion clause, was present for consideration and a factor in the situation, the burden of proof was upon the plaintiff.

In the case of *Mattlage vs. German American Insurance Co.*, tried before Judge Wallace and a jury on April 7, 1904, Judge Wallace said:

Ordinarily, I should say that the defendant had the burden of proof upon this issue, but the case is a somewhat peculiar one in one respect. The fall of the building, if it did fall, until it was destroyed by fire, was caused by an explosion, and if it was caused by an explosion, the damage ensuing must fall upon the plaintiff, because the defendant is exonerated under its contract.

LOSS OCCASIONED BY ORDINANCE OR LAW REGULATING CONSTRUCTION OR REPAIR.

The liability of the insurer under our form of policy is subject to the following provision:

This company shall not be liable * * * for loss occasioned by ordinance or law regulating construction or repair of buildings * * *.

The provision just quoted, has been the subject of very spirited dispute so far as its application and effect is concerned, throughout the various jurisdictions in the United States and elsewhere, and it may not yet be said that the matter is entirely clear.

Judge Deitch, in his Lectures on "The Standard Fire Insurance Policy," said:

On those policies not containing the above provision, the company is liable for a total loss in those cases where a building is damaged to such an extent as to come within the law or ordinance forbidding its repair.

HAMBURG-BREMEN FIRE INS. CO. v. GARLINGTON,
66 Tex. 103.

LARKIN v. GLENS FALLS INS. CO.,
(Minn.) 29 Ins. L. J. 833.

BRADY v. INS. CO.,
11 Mich. 445.

MONTELEONE v. INS. CO.,
47 La. Ann. 1563.

FIRE ASS'N v. ROSENTHAL,
108 Pa. St. 474.

These authorities lay down the rule that such ordinances are a part of the contract of insurance, and that the insurance company is bound

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thereby. The company is entitled to what remains of the building or to have the value of what remains deducted from the recovery. The rule announced in the above cases would not apply in case of a loss where the above provision appears in the policy. The object of the insertion of this provision in the New York standard form of policy (and the same provision is found in nearly all of the other standard forms of policies) was to avoid the rule announced in these cases.

In discussing a somewhat similar condition, Mr. Milnes, in his hand-book entitled "Fire Loss Settlements," states the law as follows:

A company electing to rebuild after a fire occupy precisely the same position the insured would if rebuilding apart from one, as regards any disability or stipulation imposed by any local authority. The insured might be required to set back to a new street line, or to leave for the future a certain portion of the site, formerly built upon, uncovered. By thus restricting the area of the new building a reduction might be effected in the cost. The company would be entitled to the benefit of this reduction, whether they elected to reinstate or adjusted the loss upon a cash basis. If, by reason of the regulations of any local authority, the cost of rebuilding be increased, the liability of the company does not follow such increase, but stops at what it would have cost to rebuild had such regulation not been in force.

In the case of:

McCREADY v. THE HARTFORD FIRE INS. CO.,
61 A. D. (N. Y.) 583,

Mr. Justice Patterson, in speaking for the full court, said:

The real question upon this branch of the case is: What is the measure of liability of the defendant under its policy? The plaintiffs insist that it is the value of the building as it stood just before the fire. Under the terms and conditions of the policy in suit, which is in the standard form required by the law of the State of New York, the parties have themselves agreed upon the measure of liability, the extent of it being distinctly provided for by a stipulation in the policy binding upon both parties. * * * By this stipulation the parties settled for themselves the measure of damages in case of loss. The plaintiffs expressly agreed that the indemnity to be furnished by the policy should be the sum that it would cost the insured to repair or replace the building with material of like kind and quality. That was the construction given to the policy by the trial judge, who, in charging the jury, repeatedly stated to them that on the question of damages the consideration by which they were to be governed was, what it would cost to restore the building after the fire in order to place it in the same condition in which it was before the fire with respect to the quality and kind of material. * * * The standard form of policy was prepared under the authority of chapter 488 of the Laws of 1886, and the use of that form is made by statute obligatory upon all companies doing business of fire insurance within the State of New York. When the policy of insurance in this case was issued, therefore, not only was the measure of damage a stipulation of the policy, but the law respecting fire-proof buildings had been in operation for many years and the standard policy was adopted in view of existing provisions of law and of the decisions of the courts of the State of New York concerning the extent of the liability of fire underwriters.

We will assume that the ordinary rules of construction apply to all the provisions of the standard policy, and that interpretation will be made in favor of the assured and for the purpose of granting him stipulated indemnity for his loss, and that but for the stipulation the measure

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of indemnity would be the difference between the actual cash value of the property just before the fire and its value after the fire if there is a partial loss; but here the parties have agreed to a particular limitation of the liability which "in no event" shall exceed the amount to be ascertained within that limitation. The stipulation does not refer to an election by the insurer to rebuild, but to the measure of the liability of the underwriter.

We think the construction given to the policy by the trial judge was right, and that the issue to be determined by the jury was properly put before them.

Judge Cooley, in his *Briefs on the Law of Insurance*, at page 3050, discusses the question now under consideration and concedes that the provision of the policy barring loss caused by ordinance or law regulating construction or repair is valid and effective.

Mr. George A. Clement, in his excellent work on "Fire Insurance as a Valid Contract," Vol. 1, p. 111, states the rule as follows:

The limitation in the standard policy that the liability of the company "shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality" does not refer to cases where the company elects to rebuild, but fixes the measure of liability in all cases, and is not affected by a local statute in force when the standard policy was prescribed, governing the construction, alteration or removal of buildings.

A case very frequently referred to affecting this question is that of

LARKIN v. GLENS FALLS INS. CO.,
29 Ins. Journal, p. 833,

where Mr. Justice Brown, speaking for the Supreme Court of Minnesota, said:

The principal question in the case is whether plaintiff suffered a total loss. It is not claimed that the building was totally destroyed, but it is claimed that it was damaged to such an extent as to render it practically worthless without extensive repairs, and that it could not be repaired, because the building inspector refused to grant a permit authorizing the same. Defendant did not elect to repair the building, as it had a right to do under the policy, but offered to pay the cost of such repair in full settlement of its liability. The ordinances of the city of St. Paul create and establish fire limits in the city within which the city assumes a supervisory control over the kind and character of buildings to be erected therein, and of the alteration and repair of the same. Certain specified kinds or classes of buildings are prohibited from being erected therein, and conditions under which a building within such limits may be altered and repaired are specified and pointed out. A building inspector is provided for, who has control and supervision over such matters. By a fair construction of such ordinances, the inspector is empowered to condemn buildings located within the fire limits whenever, in his judgment, they have been damaged by fire or decay to the extent of 50 percent of their value; and when so condemned by him, and when he refuses a permit to make repairs on such a building, it is made unlawful for the owner thereof to make the same. There is no question in this case but that the insured building was within such fire limits, and no question but that the building inspector refused a permit to repair the same after the fire. Nor is there any question but that, without proper and suitable repairs, the building was rendered practically worthless by the fire. So we are confronted with the question as to the effect of such

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ordinances, and the action of the inspector thereunder, on the contract of insurance. The question is a new one in this State, and an examination of the books discloses very few adjudged cases on the subject in other States. We have found only the following: *Insurance Co. v. Garlington*, 66 Tex. 103; *Brady v. Insurance Co.*, 11 Mich. 445; *Brown v. Insurance Co.*, 1 El. & El. 853; *Association v. Rosenthal*, 108 Pa. St. 474; *Monteleone v. Insurance Co.*, 48 La. Am. 1563. These authorities lay down the rule that such ordinances are a part of the contract of insurance, and that the insurer is bound thereby. This is in line with the general doctrine that, where parties contract upon a subject which is surrounded by statutory limitations and requirements, they are presumed to have entered into their engagements with reference to such statute, and the same enters into and becomes a part of the contract. There would seem to be no logical reason why this general rule should not apply to a case of this kind. The parties are presumed to know of the ordinances. They directly and materially affect their rights in case of a loss under the policy, and should govern and control in the adjustment and settlement of such loss. *Joyce, Ins.* (§3170), states the law as follows:

"If the policy be upon a building of such material and character and situation with relation to fire limits that it cannot be repaired, because of a city ordinance prohibiting repairs to such buildings within fire limits when damaged to the extent of one-third their value by fire, * * * and the insurers are prevented from repairing, a recovery may be had for a total loss."

To this may be added the qualification that, if what remains of the building after the fire be of any value over and above the cost and expense of removing it, such excess value must be deducted from the recovery. The evidence on this subject is that the building was of no value whatever over and above what it would cost to take it down and remove it from the lot. There can be no question as to the authority of the city to enact the ordinances in question. They are in the interests of the public welfare and within the police power, and we adopt the view that they become an integral part of all contracts of insurance upon property within the fire limits to which they apply. Counsel for defendant does not seriously contend to the contrary.

It must be observed, however, that from the reported decision just quoted from, it does not appear that the policy there sued on contained the provision protecting the insurer against loss caused by ordinance or law.

Another interesting case is that of

HEWINS v. LONDON ASSUR. CORP.,
184 Mass. 177,

wherein the validity of the clause in question was sustained.

From the foregoing authorities, I think it is reasonably well settled that the provision of the standard policy now under discussion is valid, protects the insurer, and limits his liability to that within the language used.

X CANCELLATION AND SUBSTITUTION

MARTIN CONBOY

Of the New York Bar

The meaning of the cancellation clause of the New York Standard Fire Policy, and the extent of the authority of agents and brokers as mediums by or through whom cancellation and substitution may be effected.

LANGUAGE OF POLICY.

The cancellation clause of the New York Standard Fire policy (lines 51-55) is as follows:

This policy shall be cancelled at any time at the request of the insured; or by the company by giving five days' notice of such cancellation. If this policy shall be cancelled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate; except that when this policy is cancelled by this company by giving notice it shall retain only the *pro rata* premium.

While the general title of this chapter is "Cancellation and Substitution," the subject, for reasons more particularly of interest to us, will be considered under two main heads, viz: (first) the interpretation of the cancellation clause, or more properly what must be done under the cancellation clause to effect cancellation, and (second) the knowledge and authority of agents and brokers in relation to a determination of whether cancellation and substitution have been effected.

Before passing to the question of authority of agents and brokers we shall, therefore, consider how the cancellation clause has been construed by the courts and what has been held to be necessary to a valid cancellation thereunder.

I.

INTERPRETATION OF THE CANCELLATION CLAUSE.

The phrase that has caused the most contention, the last one, "except that when this policy is cancelled by this company by giving notice it shall retain only the *pro rata* premium," taken by itself seems to indicate that when the policy is cancelled, that is at the very moment of cancellation, inasmuch as only the *pro rata* premium may be retained, all the rest of the premium must be returned. This is merely an application to the summary process of

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cancellation, permissible under the policy, of the ordinary equitable doctrine, relating to cancellation of any instrument, that unearned benefits thereunder must be returned. It is only equitable, that a return of the unearned premium should be a condition precedent to cancellation. If the return of the unearned premium had been enjoined upon the insurance company without such act being made a condition of valid cancellation, it would be possible for the company to deprive the policyholder of his insurance leaving him only a law suit for his premium.

When the preceding portion of the clause is read, however, some reason appears for the contrary point of view. The unearned premium is to be returned on the surrender of the policy, and the sentence in which this direction is contained is quite distinct from that describing the method of cancellation. Such is the argument of Chief Judge Parker in an able dissenting opinion in the leading case, *Tisdell v. New Hampshire Fire Ins. Co.*, 155 N. Y., 163.

That a return of the unearned premium is a condition precedent to cancellation was decided by Judge Bartlett at the trial of the earlier case of *Nitsch v. American Central Ins. Co.* The decision, affirmed both at general term and in the court of appeals, without opinion, appears no where in the reports.¹ For a time the Appellate Division held that an offer to refund the unearned premium was sufficient to meet the requirements² but in the *Tisdell* case, the Court of Appeals, following some earlier cases upon explicit clauses in policies³ decided that an actual repayment or tender was necessary, and the law is well settled now that a fire insurance company defending an action on a policy upon the ground that it had cancelled the same must show that its notice of cancellation was accompanied by an actual tender of the unearned portion of the premium paid.⁴

The majority opinion in the *Tisdell* case represents the weight of authority⁵ although Judge Parker's views have prevailed in the federal courts,⁷ and in some other jurisdictions.⁸

1 83 Hun. 614 and 152 N. Y., 635.

2 For Judge Bartlett's reasoning see the quotation in note to *Davidson v. Germania Ins. Co.*, 13 L. R. A., N. S., 884.

3 *Walthear v. Pennsylvania F. Ins. Co.*, 2 App. Div. 328; *Backus v. Exchange F. Ins. Co.*, 26 App. Div. 91.

4 *Van Valkenburgh v. Lenox Fire Ins. Co.*, 51 N. Y. 465; *Griffey v. New York Central Ins. Co.*, 100 N. Y., 417.

5 *C. A. Smith Lumber Co. v. Colonial Assurance Co.*, 172 App. Div. 149.

6 *German Union Fire Ins. Co. v. Clarke*, 116 Md., 622; 82 Atl., 974; *Hartford Fire Ins. Co. v. Tewes*, 132 Ill. App. 321; *Chrisman & S. Bkg. Co. v. Hartford Ins. Co.* 75 Mo. App. 310; *Aetna Ins. Co. v. McGuire*, 51 Ill. 342; *Phoenix Assurance Co. v. Munger Improved Cotton Machine Mfg. Co.* 92 Tex. 297; *Philadelphia Linen Co. v. Manhattan F. Ins. Co.*, 8 Pa. Dist. Ct. 261. See *Taylor v. Insurance Co. of North America*, 105 Pac. (Okla.) 354 for a review of the authorities.

7 *Schwarzschild & Sulzberger Co. v. Phoenix Ins. Co.*, 124 Fed. 52; *El Paso Reduction Co. v. Hartford Fire Ins. Co.*, 121 Fed. 939; see also *Chadbourne v. German-American Ins. Co.*, 31 Fed., 533.

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There is a suggestion by Judge Vann of the New York Court of Appeals, in a dissenting opinion in another case* that a surrender of policy is necessary to a cancellation by the insured apparently on the ground that a return of the unearned premium is necessary to cancellation.

This would seem, however, to be applying the rule in the Tisdell case beyond its reason for the phrase upon which that case is founded applies only to cancellation by the company.

In a Virginia case," the agents of the cancelling company had made urgent and repeated efforts to obtain from the insured payment of premiums that they had remitted to the company and eventually served a cancellation notice covering certain policies, one of which was involved in the suit. The notice concluded as follows:

On the four policies mentioned in this notice, no part of the premiums has ever been paid, and the premiums earned for the time they have been in force, including costs of protest of drafts, etc., amounts to \$36.28.

The return premiums on the three policies last named amount to \$43.08, of this we apply \$36.28 to the premiums due on the first four policies, leaving balance of \$6.80 to be paid you on return of the policies. Please return all of the policies without delay.

This notice was sent and received in August. The insured treated it with silence and proceeded to reinsure part of the properties covered by the cancelled policies in other companies. In the following February there was a fire, and claim was made on the cancelled policies, it being contended that the notice of cancellation was insufficient, because the unearned premium was not returned.

There were two recoveries in favor of the insured, both reversed, and in the report to which I have referred, the Supreme Court of Appeals of Virginia, without the citation of a single authority, disposed of the contention made by the insured by applying the \$6.80 of unearned premiums to the satisfaction of premiums on the policy during the period between notice of cancellation and

8 Davidson v. German Ins. Co., 13 L. R. A. (N. S.) 884; 65 Atl. 996, where an elaborate foot-note will be found; Webb v. Granite State Fire Ins. Co., 129 N. W. 19 (Mich.).

9 "Whether the insurer or the insured is the actor in the attempt to cancel, cancellation is not complete until the unearned premium is returned. (Tisdell v. New Hampshire Fire Ins. Co., 155 N. Y., 163, 165.) If the insured is the actor, the surrender of the policy and the return of the premium are concurrent acts. If the insurer is the actor, the notice and the return of the premium are sufficient for the insured might be unwilling to surrender the policy." Vann, J., dissenting in Buckley v. Citizens Ins. Co., 188 N. Y., 399, at 405.

The cases where cancellation is at the instance of the insured seem all to be confused with a cancellation by mutual consent. It seems a curious doctrine to compel the insured to secure the unearned premium from the company before he can cancel. See Ragley Lumber Co. v. Insurance Company of North America, 94 S. W. 185; 42 Tex. Appeals, 511; Stevenson v. Sun Insurance Office, 119 Pac. 529 (Cal. App.). The case of Farmers Mut. Ins. Co. v. Phenix Ins. Co. of Brooklyn, 90 N. W. 1000; 65 Neb., 14 reversed (but the point in question reaffirmed) in 95 N. W. 3; 65 Neb. 14, is distinguished on the ground that the recovery of unearned premiums was what was there involved.

10 Hamburg-Bremen Fire Ins. Co. v. Browning, 48 S. E. 2.

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the occurrence of the fire at the rate of \$2.55 per month, thus wiping out the margin of premium and effecting a cancellation *eo instanti* by what might not inaptly be termed a legal *tour de force*. The conclusion is thus stated:

The fire did not occur for more than six months after the cancellation notice, at which time the policy sued on had long since elapsed by the non-payment of premiums.

TENDER OF INTERVENING LIABILITY UNNECESSARY.

There is nothing in the language of the standard policy that requires the company to tender, as a condition of cancellation, the amount due on any intervening liability. "In the absence of any provision making payment of intervening liability a condition precedent to cancellation of the policy and in view of the express requirement for payment of the unearned portion of the premium, the conclusion would seem to follow that in order to effect a cancellation a tender of the amount of intervening liability either in full or as reduced by the earned portion of the premium is unnecessary. Another reason for this conclusion is that the loss which the company is required to pay is no part of the benefit that it obtains from the insured and which under the equitable doctrine referred to at the outset, as well as under the explicit determination of the courts of this state, must be returned to the extent that it is unearned.

FORM OF NOTICE OF CANCELLATION.

The notice of cancellation must state unconditionally the determination of the company to cancel at a specific time. "A notice by the agent that the company 'will cancel the policy I sent you,' is insufficient." If, however, it is clear from the language of

- 11 A dictum in *American Employers &c. Ins. Co. v. Fordyce*, 62 Ark. 562, seems opposed to the text, but does not change the writer's opinion. It is as follows:

"If the entire premium had been paid and no liability had accrued between the time of the execution of the policy and the time of cancellation the insurer might have cancelled the policy under certain conditions therein contained by refunding the premium less the pro rata portion thereof for the time the policy was in force. If in the meantime, a liability had accrued cancellation without the assent of assured could only take place by refunding the premium, less the pro rata for the time the policy had been in force, and also by the payment of intervening liabilities."

- 12 "No particular form of notice is prescribed. It is only necessary that the company positively, distinctly, and unequivocally indicate to the insured that it is its intention that the policy shall cease to be binding as such upon the expiration of five days from the time when this intention is made known to the insured; and it does not matter whether this information is conveyed by the use of the words 'Your policy will be canceled in five days,' or 'Your policy is already canceled.'"

Davidson v. German Ins. Co., 13 L. R. A. (N. S.), 889.

- 13 *Gardner v. Standard Ins. Co.*, 58 Mo. App. 611; *Chrisman & Sawyer Bkg. Co. v. Hartford Ins. Co.*, 75 Mo. App. 310; *McNeill v. Aetna Ins. Co.*, 176 Ill. App. 575.

"Where the notice to a mortgagee was signed by an agent without showing for whom he was acting, was dated in a different town from that in which the property was situated and the name of the mortgagor was so blurred as to be illegible, it was held insufficient."

State Ins. Co. of Des Moines, Iowa v. Hale, 95 N. W. 473; 1 Neb. (unoff.) 191.

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the notice that the company wishes to determine its liability and fixes the time of termination, the notice is sufficient. Thus, a notice expressing a "desire to terminate liability" and stating that the policy "will be cancelled on our books on the 14th inst., five days from date" has been held to suffice.^{13a}

MANNER OF GIVING NOTICE.

The manner of giving notice has thus been defined by an able federal judge:

Our conclusion is that under the provision of an insurance policy that it may be cancelled by the insurer by giving notice of cancellation and tendering a ratable proportion of the premium to the insured mailing the notice, or a copy of it, and the return premium in a letter post-paid and addressed to the insured at its post office address, or delivering a copy of the notice and the return premium to an agent of the insured in charge of its office and business are sufficient to effect the cancellation, where the insured is a foreign corporation and all its officers are absent from the state in which its office, its principal place of business, and the property insured are situated.¹⁴

FORM OF TENDER OF UNEARNED PREMIUM.

The directions of the cancellation clause should be strictly complied with.¹⁵ A tender of another policy for a part of the insurance with the balance of the unearned premium in money is not sufficient tender in states following the Tisdell case.¹⁶

WHEN NOTICE TAKES EFFECT.

Notice of cancellation takes effect only from its receipt.¹⁷ Thus where a notice of cancellation sent by an insurance company was contained in an envelope which bore in its corner the name of the company's agents but coupled not with the name of the insuring company but that of another company, for which they were also agents, and the envelope thus marked was received but laid aside unopened, it was held that there was not sufficient notice, the actual notice not having been seen by the addressee before the fire and the envelope not being so marked as to give him warning.¹⁸ Thus also, where a registered letter was received in the post office in the town of the assured's residence more than five days before the fire and two successive notices that such a letter had been received were

- 13-a *Bergeson v. Builders Ins. Co.*, 38 Cal. 541; *Ralston v. Royal Ins. Co.*, 140 Pac. 552.
14 *American Glove Co. v. Pennsylvania Ins. Co.*, 113 Pac. 688; 15 Cal. App. 77.
15 *Sanborn, J. in Liverpool, London & Globe Ins. Co. v. Harding*, 201 Fed. 515.
16 *Scheel v. German American Ins. Co.*, 76 Atl. 507; *Northern Pine Crating Co. v. Liverpool, London & Globe Ins. Co.*, 143 Wis. 433.
17 *Quong Tue Sing v. Anglo-Nevada Assurance Corp. (Cal.)* 10 L. R. A. 144.
18 *Crown Point Iron Works v. Aetna Ins. Co.*, 127 N. Y. 608; *Davidson v. Germania supra*; *Mullen v. Dorchester Mut. F. Ins. Co.*, 121 Mass. 171; *Farnum v. Phoenix Ins. Co.*, 83 Cal. 246; *Hartford Ins. Co. v. Tewes*, 132 Ill. App. 321.
18 *Fritz v. Pennsylvania Fire Ins. Co. (N. J.)* 88 Atl., 1065; 50 L. R. A. (N. S.) 35.

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placed in the assured's letter box, the assured was held not to have sufficient notice because he did not actually receive the letter within five days of the fire."

✓ Under this topic belongs also a curious case which recently arose in Alabama.¹⁹ The policy in that case contained the provision that "notice of cancellation deposited in the United States mail postage prepaid, to the address of the assured, as stated herein, shall be sufficient notice, and the check of the company or its duly authorized agent similarly mailed a sufficient tender of any unearned premium." The notice of cancellation with check enclosed was sent by the company to the insured by registered mail, a direction being put upon the envelope to return if undelivered within five days. But for such a direction the postmaster would have been justified under the postal regulations in retaining it for any period under three months, if he thought by so doing he might deliver it. The addressee, the insured, was out of town when the letter arrived and as he did not return for more than five days thereafter, he never received the notice, it being returned to the company pursuant to instructions. The court held that this was not effective notice of cancellation.

HOW TIME IS COMPUTED

The time is not computed from the precise moment of receipt nor from noon of the day thereof, even though the insurance runs from noon to noon, but the time provided for in the cancellation clause, as is the case with time provisions in all collateral matters connected with the insurance policy, is computed to the general legal rule "of excluding the first day and counting the days as legal days beginning and ending at midnight."²⁰

It seems to be the law in Maryland that a notice, although stating that five days notice is given, which specifies a date upon which the cancellation is to take effect and which fails to reach the insured five days or more before the time specified, not only is ineffective in cancelling the policy at the date intended but is utterly ineffective to cancel the policy at any time.²¹ This seems to be because in that state the cancellation of the insurance company on its books of the insurance is necessary.²² According to the general weight of authority no act on the part of the company other than

19 *Potomac Ins. Co. v. Atwood*, 118 Ill. App. 349.

20 *American Automobile Ins. Co. v. Watts*, 67 So. 758.

21 *Pennsylvania Plate Glass Co. v. Spring Garden Ins. Co.*, 189 Pa., 255; 42 Atl. 138.

22 *German Union Fire Ins. Co. v. Clarke*, 116 Md. 622; 82 Atl. 974; 39 L. R. A. (N. S.) 829.

23 *American Fire Ins. Co. v. Brooks*, 83 Md. 22.

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giving notice and making proper payment is necessary to cancellation," while a notice which specifies a particular time when cancellation shall become effective, although it will not affect a cancellation until five days after its receipt is not invalid though received within that time of the day which is specified."

NOTICE TO EXCLUDE SUNDAY.

The question of the inclusion or exclusion of Sunday from the five days given in the Standard Fire policy after notice of cancellation either as regards an intervening Sunday or a Sunday upon which the five days begin or end does not seem to have arisen in any adjudged case in this country. Cases involving similar questions in regard to other periods of time are so common that it is extremely doubtful whether a case precisely in point from a foreign jurisdiction would have any particular force as settling a question of insurance law. The question would quite as probably be settled by the past decisions of the particular jurisdiction on the general subject of the reckoning of time.

Since the general rule of computation of time, which has been held to apply to the computation of time preceding effective cancellation, excludes the day from which computation is made, no question is raised if the notice of cancellation reaches the insured on a Sunday. Thus, when the day on which an assessment upon a life policy fell due was Sunday and thirty days of grace were given the thirty days began to run at midnight of Sunday."

Where the last of the five days falls upon Sunday we are, however, confronted by a different problem, the solution of which depends in great measure upon whether the Standard Fire policy is to be governed by the rules of construction applying to statutes of this State. If such were the case, not only would the specific provisions of the General Construction Law²⁴ be applicable in this jurisdiction but the distinction on this point, which is quite widely recognized, between the computation of contract and statute time would come into operation. It seems pretty definitely settled, however, that the provisions of the policy although prescribed by the legislature are to be construed by the ordinary rules of contract construction.

The object of the New York statute is declared to be to provide a uniform contract or policy of fire insurance—not to prescribe terms which

²⁴ *Bergson v. Builders Ins. Co.*, 38 Cal. 541.

²⁵ *Fritz v. Pennsylvania Fire Ins. Co.* (N. J.) supra; *American Glove Co. v. Pennsylvania Fire Ins. Co.*, 15 Cal. App. 77; *Philadelphia Linen Co. v. Manhattan Fire Ins. Co. of N. Y.*, 8 Pa. Dist. Ct. 261; *Emmott v. Slater Mut. F. Ins. Co.* 7 R. I., 562; *Commercial Union Fire Ins. Co. v. King*, 156 S. W., 445; *Ralston v. Royal Ins. Co.*, 140 Pac. 552.

²⁶ *Actna Life Ins. Co. v. Wimberly*, 23 L. R. A. (N. S.) 759; 119 S. W. 855.

²⁷ Section 20.

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should seem to the legislature reasonable. When the act was passed, the form of policy had not yet been adopted. Its preparation was left to insurance men, to wit, the New York Board of Fire Underwriters, and by section 3 of the act it is provided that any policy made in terms inconsistent with the provisions of the act shall nevertheless be binding upon the company.²⁸

So it was said with regard to the arbitration provision of the Massachusetts Standard policy.²⁹

It is argued for the defendant, that the provision may have more effect to bar the plaintiff's action if construed as a statute than if regarded merely as a contract. If the Legislature prescribes and annexes to a particular right a special remedy a party is confined to that remedy. *Boynton v. Middlesex Ins. Co.*, 4 Met. 212. But this provision is not in form a legislative enactment. It is put forward by the Legislature as a contract to be entered into by the parties, and to derive its validity from their consent. It is their contract; as such it does not deprive the plaintiff of his action and his trial by jury; it not to be presumed that the Legislature intended by prescribing the form of contract, and prohibiting any other to give it effect in depriving a party of rights which as a contract it would not have.

A further reason is that the terms of the standard policies were used prior to their adoption by the legislature in insurance contracts and "It is to be assumed that these terms were used in this policy in the sense in which they were previously used and defined."³⁰

If in accordance with the foregoing authorities we assume that the Standard Fire Insurance policy is to be interpreted by the ordinary rules of contract construction, we may rely upon a great weight of authority³¹ to the effect that the period will not expire until Monday night. It is noticeable, however, that this rule is usually based on the ground that performance of a contract upon Sunday would be against law or invalid.

Such being the case, the assured was under no obligation to do what would have been not only an illegal act but also one which the other party was not bound to recognize. In this view of the case there was no such default on the part of the assured in not paying the premium fully due on the 1st of October as should be held to terminate the policy.³²

Similarly the principal case against the foregoing proposition³³ is based upon the assertion that the performance of a contract on Sunday would be both lawful and valid.

²⁸ *Richards on Insurance* (2nd ed.), 53.

²⁹ *Reed v. Washington Ins. Co.*, 138 Mass. 572.

³⁰ *John Davis & Co. v. Insurance Co. of North America*, 115 Mich. 382; see also to the same effect *Kollitz v. Equitable Trust Fire Ins. Co.*, 99 N. W. 892; *Chichester v. N. H. Fire Ins. Co.*, 74 Conn. 510; 51 Atl. 545.

³¹ *The Harbinger*, 50 Fed. 941; *Striker v. Vanderbilt*, 27 N. J. L., 68; *Salter v. Burt*, 20 Wend. 205; *Avery v. Stewart*, 2 Conn. 69; *Campbell v. International Life Assurance Soc.*, 4 Boerw. 298; (this case and that of *Amis v. Kyle* [infra] contain elaborate histories of Sabbath observance); *Barrett v. Allen*, 10 Ohio 426; *Balkwill v. Bridgeport Wood Furnishing Co.*, 62 Ill. App. 663; *Post v. Garrow*, 18 Neb. 682; 26 N. W. 580; *Warne v. Wagoner*, 15 Atl. 307; *Porter v. Pierce*, 120 N. Y. 217.

³² *Hammond v. American Mutual Life Ins. Co.*, 10 Gray, 306.

³³ *Amis v. Kyle*, 2 Yerg. 31; see also *Mingus v. Britchet*, 14 N. C., 78; *Kilgour v. Miles*, 6 Gill & J. 268.

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Although in the instance we are considering the contract does not require any act to be done on the final day and therefore may seem to differ from the ordinary case it would appear that the general rule would apply, first, as was remarked in a New Jersey case," "So to hold is to put this case in accord with the great weight of authority and is consistent with the well settled rule that so far as fair construction of the language used will permit, the conditions and provisions of a policy with reference to forfeiture should be strictly constructed in favor of the insured and against the company;" second, because the point is so comparatively trivial that public convenience would seem to require a uniform rule rather than one based upon nice reasoning in each case; and third because the object for which the five days' notice is given in an insurance policy is to allow the insured to obtain a new insurance policy in another company, which would be practically difficult on Sunday."

The last reason would apply equally well to Sunday occurring between the first and last of the five days as to one falling upon the last day. Upon this point, however, the authorities are by no means so clear. The rule is laid down by a considerable number of cases, notably in Michigan and Massachusetts that

when a statute fixes a limitation of time within which a particular act may or may not be done if the time limited exceeds a week, Sunday is included in the computation; but if it is less than a week, Sunday is excluded. This is the established rule of interpretation in this state."

The cases supporting this view that have been examined have been without exception cases of statute," and the commentator to the anonymous case in 2 Hill (N. Y.) 375 makes the assertion that the rule is confined to statutory interpretation. No reason appears for this distinction, however. The cases against the foregoing rule are quite numerous," and one at least applies the rule which it lays down as well to contracts as to statutes."

34 *Bohles v. Prudential Ins. Co.*, 86 Atl. 438.

35 *Bard v. Firemen's Ins. Co.*, 108 Me. 506; 81 Atl. 870; *Rosen v. German Alliance*, 106 Me. 229; 76 Atl. 688; *Hartford Fire Ins. Co. v. Tewes*, 132 Ill. App. 321; *Continental Ins. Co. v. Donell*, 25 Ky. Law Rep. 1501.

36 *Cunningham v. Mahon*, 112 Mass. 58.

37 *Hannum v. Tourtellot*, 10 Allen 494; *Tuttle v. Boston*, 215 Mass. 57; *Haley v. Young*, 134 Mass. 364; *Cowley v. McLoughlen*, 141 Mass. 181; *Campfield v. Cook*, 92 Mich. 626; *Fellmen v. Mercantile F. & M. Ins. Co.*, 116 La. 723; *Thayer v. Felt*, 4 Pick. 354; *Craig v. U. S. Accident & Health Co.*, 61 S. E. 423 (S. C.); *Minor v. McDonald*, 140 S. W. 401; *Snell v. Scott*, 2 Mich. N. P. 108; *Anonymous*, 2 Hill 375; *LeFavaur v. Bartlett*, 42 N. H., 555; *Mason v. Thomas*, 36 N. H. 302; *Tuttle v. Gates*, 24 Me. 395; *Whipple v. Williams*, 4 How. Pr. 27 State ex rel State Pharmaceutical Assn. v. Michel, 52 La. Ann., 926; 49 L. R. A. 218; in New York the case of *Whipple v. Williams* is disapproved in *Taylor v. Corbiere*, 8 How. Pr. 385.

38 *Cressey v. Parks*, 75 Me., 387; 46 Am. Rep. 406; *German Savings Bank v. Cady*, 114 Ia., 228; *Anderson v. Baughmen*, 6 Mich. 298; *Corey v. Hilliker*, 15 Mich. 314; *State v. Green*, 66 Mo. 631; *Keter v. Ry. Co.*, 86 N. Car., 346; *Payton v. State*, 35 Tex. Crim. 508; *Oeber v. Steer*, 28 Cir. Ct. Rep. (Ohio) 620; *Adams v. State*, 35 Tex. Crim. 285; *Martin v. Sunset Tel. & Tel. Co.*, 18 Wash. 260.

39 *Bowles v. Brauer*, 89 Va. 466.

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Bearing in mind the object of the five days provision and the difficulty of securing insurance on Sunday, it would seem that the following reasoning of Lord Chief Justice Ellenborough would be peculiarly applicable to the situation in question:⁴⁰

Lord Ellenborough, C. J. The object of the rule is, that the bail should have four days allowed them to search the office that they may know whether it be necessary to render their principal or not. That being so and Sunday not being a day on which any search can be made the bail would, if Sunday were reckoned as one of the days only have three entire days during which they could search the office. I am therefore of opinion that the *ca. sa.* should have lain in the office four entire days exclusive of the Sunday; and consequently that the proceedings are irregular.

STRICT COMPLIANCE MAY BE WAIVED.

An insurance policy may be cancelled by agreement between the parties and the right to five days notice or the return of the unearned premium may be waived. A surrender of the policy by the insured to the company will be generally held to be such waiver,⁴¹ not, however, if it appear that the insured was ignorant of his rights.⁴² A formal surrender of the policy is, however, only important as evidence of such an agreement and cancellation may be made immediately without return of premium or surrender of the policy if there is a meeting of the minds of the parties to that effect.⁴³ "The requirements of the policy as to the cancellation by the insurance company are inserted for the benefit of the assured, and may be waived by him."⁴⁴ It must, of course, appear that the act upon which the alleged waiver depends was authorized by the party to be bound thereby.⁴⁵

40 *Howard v. Smith*, 1 Barn. & Ald. 528.

41 *Burkley v. Citizens Ins. Co.*, 118 N. Y. 390; *Gorge Hotel v. Liverpool, London & Globe Ins. Co.*, 122 App. Div. 152; *Kelley v. Actna Ins. Co.*, 84 S. E. 502.

42 *Rosen v. German Alliance Ins. Co.*, 76 Atl. 688. *Bragg v. Royal Ins. Co.*, 98 Atl. 632.

43 *Hillock v. Traders Ins. Co.*, 54 Mich. 532 (opinion by Cooley, C. J.); *Cox v. Farmers Mut. F. Ins. Co.*, 133 Ga. 175; see *Home Ins. Co. v. Chattahoochee Lumbar Co.*, 126 Ga. 334.

44 *Hancock v. Hartford Fire Ins. Co.*, 81 Misc. (N. Y.) 159, 163.

45 *Northern Pine Crating Co. v. Liverpool, London & Globe*, 143 Wis., 433.

The following quotations from a very recent case in Pennsylvania indicate further complications that may arise out of the surrender of policies by the insured to the insurer and the possible interpretation of the act as a waiver.

"The agent's version of the affair is that he was directed by the company to cancel the policy, that he went to the insured and without indicating for which company he was acting, told him that he had to reduce the line of insurance held by him and that the insured, the plaintiff, told him that he would give him all the policies and that he should select the one that he wanted."

"Taking the agent's story, plaintiff's direction to him was merely a permission to the agent to make his, the agent's, selection of a policy for cancellation. It may well be argued, that the act of cancellation was the act of the company through its agent, that the indefinite permission given without relation to any particular policy constitutes no waiver of the provision of the company requiring notice of cancellation."

"The account of the transaction as given by the plaintiff differs very materially from the above. He asserts that the agent told him one of the policies had to be changed but the agent could not recall which, but thought he could tell if he saw them all, that the plaintiff then gave him all the policies and asked him to keep them in his safe. The policy in question required five days' notice of cancellation. Of course, if the plaintiff's story was believed by the jury there could

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In determining to whom notice must be given, the general principle is that the notice must be given to the person upon whom rests the obligation to pay the premium.⁴⁶

THE RIGHT OF MORTGAGERS.

This notice to the party responsible for premiums is not, however, always sufficient. A mortgagee is entitled to the same notice upon cancellation by the company as the insured himself would be and this is true independently of the mortgagee clause if the policy provide that the loss is payable to the mortgagee.⁴⁷

It has been held under the Maine Standard policy, and the same reasoning would apply to the New York policy, that the mortgagor may not cancel the insurance as regards the mortgagee by giving notice to the company, unless he also gives notice to the mortgagee.⁴⁸

So also the consent of the mortgagee of the insured premises to the cancellation of the policy, without the knowledge of the insured, is ineffectual and cannot deprive the latter of his rights.⁴⁹

Since, under the cases, the mortgagee clause constitutes, in addition to the contract with the mortgagor, a separate and independent contract, whereby the mortgagee's interest is insured, notice to the mortgagee of cancellation of the mortgagee clause may be in practice a very effective method of ending liability to the mortgagor, when it is difficult to serve notice on the latter.

The question of the effect of a notice of cancellation sent to the insured upon the interests of parties unnamed in the policy and only included by virtue of such a clause as "on account of whom it may concern," "their own or held by them in trust or on commission" or similar clauses does not seem to have been answered in any cases.

be but one result and that would be a verdict in his favor." * * *

"A contract for insurance providing for notice cannot be cancelled without it. Where a policy has been delivered by the insured to the local agent at his request and the condition as to this delivery is disputed as to whether it was so surrendered for cancellation or correction the treatment of the policy raises a disputed fact which is properly for the jury. *Mauk v. Commercial Union Ass. Co.*, 7 Pa. Super. Ct. 633."

Davis v. Continental Ins. Co., 60 Pa. Super. Ct. 341.

⁴⁶ *Cooley's Briefs on Insurance*, p. 2796.

⁴⁷ *Latten v. Royal Ins. Co.*, 45 N. J. L. 453, where the court said: "On the plainest principles of justice, the insurer, under such a stipulation cannot terminate the contract of insurance by withdrawing it before the expiration of the term specified in the contract without notice to the mortgagee."

This was in a case in which the premium had been paid by the mortgagor and no more explicit provision existed in the policy in regard to the mortgagee than "Loss, if any, payable to Fanny Latten and Angelica Latten, mortgagees."

Rawle v. American Central Ins. Co., 77 S. E. 1013; 94 S. C. 299; *Glasscock v. Liverpool, London & Globe Ins. Co.*, 188 S. W. 281 (— App. Tex.).

⁴⁸ *Gilman v. Commonwealth Ins.*, 112 Me. 528; 92 Atl. 721; L. R. A. 1915, c. 758.

⁴⁹ *Peterson v. Hartford Fire Ins. Co.*, 87 Ill. App., 567, reversed on question of practice in 187 Ill. 395.

The text to the contrary in 16 Am. & Eng. Ency. of Law (2nd Ed.), page 873, for which the case of *Mueller v. San Francisco Ins. Co.*, 187 Pa. 309, is cited as authority, is discussed and declared to be unsound in *Continental Ins. Co. v. Parkes*, 142 Ala. 650, at p. 656.

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One test for determining whether notice of cancellation must be given to persons other than the person liable for premium is whether such persons were individually contemplated when the contract was made.⁵⁰ Subject to this qualification, all persons who are by the terms of the policy interested in maintaining it in force should receive such notice.⁵¹

When goods are held in trust it is, of course, lawful for the trustee to insure them in his own name and he may recover for the entire value holding the excess over his own interest in them for the benefit of those who have entrusted the goods to him.⁵² Under such circumstances it would seem that notice to the assured would protect the company against the interest of the beneficiaries, because it is inferable that he is their agent to insure and keep insured and, therefore, to receive notice of cancellation.

The force of this argument lies in the difference between such an insurance and that under a mortgagee clause. It is believed that this view is not controverted by the case of *Utica Canning Company against Home Insurance Company*.⁵³ In that case *Lewis DeGroff & Son* were insured by policies containing a commission clause, and when their warehouse burned down there was injured a quantity of beans belonging to the plaintiff. The plaintiff requested *DeGroff & Son* to include the value of its beans in the proofs of loss and collect the same from the insurance company for its benefit, but *DeGroff & Son* refused so to do. It later requested *DeGroff & Son* to bring a suit on the policies or permit the plaintiff to sue in their name on the policies, and was again refused. The loss which was not the entire amount of the insurance was paid *DeGroff & Son*, and in settlement the latter gave to the insurance company a receipt, attempting the cancellation of the policies. This was on December 30th, 1907. On the 18th November preceding the plaintiff had filed

50 "Of course, it must be made to appear that the owner was in the intention of the person effecting the insurance when the contract was made (1 *Phillips on Ins.*, p. 198, Sec. 383). Such intention need not have fastened at the time of entering into the contract upon the very person, who, when the contract matures, seeks to take the benefit of it. Otherwise policies to commission merchants, warehousemen, factors and persons in the position of these plaintiffs in which are clauses of this general nature, would be of little avail. For obviously, it cannot be foreseen who will, in the course of the term of the policy come into such relations with them. And it is to be assumed that everyone was in the intention of the insurer, who subsequently with design takes such relations to him as brings him within the clauses of the policy. The intention must have been to effect insurance for any person and all persons who during the running of the policy should have goods within its description of property insured."

Waring v. Indemnity Fire Ins. Co., 45 N. Y. 606, 613.

See also, *Hagan v. Scottish Ins. Co.*, 186 U. S. 432.

51 *Rawle v. American Central Ins. Co.*, 77 S. E. 1013; 45 L. R. A. (N. S.) 463; cf., *Mueller v. Southside Fire Ins. Co.*, 87 Pa. St. 403.

52 *California Ins. Co. v. Union Compress Co.*, 133 U. S. at 409; *Munich Assurance Co. v. Dodwell & Co.*, 128 Fed. 410; *Home Ins. Co. v. Baltimore Warehouse Co.*, 93 U. S. 527; *Symmers v. Carroll*, 149 App. Div. 641.

53 132 App. Div. 420.

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its proofs of loss in a suit in its own name against the insurance company and it was allowed to recover. It will be seen from the foregoing facts that the case recognizes the right of the insured under a commission clause to recover the whole amount and the case goes no further than to allow recovery by the bailor in case a bailee wrongfully refuses to sue in his behalf.

A case in Alabama which it is interesting to consider with the foregoing is that of *Snow v. Carr*.⁵⁴ In that case Snow, a seller of musical instruments and other merchandise, was insured under the commission clause. The fire which destroyed his place of business caused damage exceeding the amount of the insurance to his own property, and also destroyed a piano belonging to the plaintiff, Carr. Snow did not include the cost of the piano in his proofs of loss and refused to share the proceeds of the policy with the plaintiff on the ground that he had the right to satisfy his own claim first. It was held that the plaintiff could recover her proportionate share of the insurance from Snow.

It would seem from the Alabama case that DeGroff & Son, the insured in the New York case, might have prevented any recovery by the plaintiff against the insurance company had they made proof of loss for the entire damage to the goods insured, which would have included the plaintiff's beans, and limited the plaintiff's remedy to a suit against themselves. The attempted cancellation was, of course, invalid as to the plaintiff because made by them after loss and after the proofs had been submitted by the plaintiff.

EFFECT OF ASSIGNMENT.

An assignment of the policy assented to by the company and accompanying a conveyance of the insured property to the assignee constitutes, according to the better authority a novation and gives rise to a new contract between the insurer and the assignee.⁵⁵ Cases

⁵⁴ 61 Ala. 363.

⁵⁵ "If, indeed, on a transfer of the estate, the vendor assigns his policy to the purchaser and this is made known to the insurer, and is assented to by him, it constitutes a new and original promise to the assignee, to indemnify him in like manner, whilst he retains an interest in the estate; and the exemption of the insurer from further liability to the vendor, and the premium already paid for insurance for a term not yet-expired are a good consideration for such promise and constitute a new and valid contract between the insurer and the assignee. But such undertaking will be binding, not because the policy is in any way incident to the estate, or runs with the land, but in consequence of the new contract. Even the assignment of a chose in action, with the consent of the debtor, and a promise on his part to pay the assignee, constitutes a new contract on which the assignee may sue in his own name."

Shaw, C. J., in *Wilson v. Hill*, 3 Met. 66; see also *Ellis v. Insurance Co. of N. A.*, 32 Fed. 646; *Virginia-Carolina Chem. Co. v. Sundry Ins. Cos.*, 108 Fed. 451; *Shearman v. Niagara Fire Ins. Co.*, 46 N. Y. 526; *Steen v. Niagara Fire Ins. Co.*, 89 N. Y. 314; *Hooper v. Hudson River Fire Ins. Co.*, 17 N. Y. 424; *City Fire Ins. Co. of Hartford v. Isaac Mark*, 45 Ill. 482; *Kimball v. Monarch Ins. Co.*, 70 Ia. 513; *Bayless v. Merchants Town Mutual Ins. Co.*, 106 Mo. App. 684; *Home Mutual Ins. Co. v. Nichols*, 72 S. W. 440; *Bullman v. North British & Mercantile*

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in which the policy is assigned after a loss or in which the assignee is merely made the appointee to receive the money upon loss should be carefully distinguished. The usual example on the latter transaction is one in which the policy is assigned as collateral security either by itself or accompanying a mortgage of the property. The holdings in such cases have sometimes thrown doubt on the general principle.⁵⁶

A novation may be analyzed into two constituent contracts, one, to which the insurance company is a stranger, by which the assignor invests the assignee with the right to collect the money when due in his stead; the other, between the assignee and the company, whereby in return for the relinquishment of the claim of the assignee, the insurer enters into a new contract of insurance.⁵⁷ It is evident that without the preliminary assignment the new contract with the insurance company would be without consideration. So it has been held, where there was no contract ever entered into with the assignor that that fact constitutes a defense against the assignee.⁵⁸ As to the result when the policy was procured by misrepresentation of the assignor, the cases are in disagreement.⁵⁹ When the assignor commits a breach of the contract such as leaving the premises unoccupied or allowing them to be encumbered and the violation continues past the time of assignment, the acquiescence by the assignee in the continuance of such cause of forfeiture will be sufficient to forfeit the new contract as against himself.⁶⁰

Where, however, the effect of the assignor's breach has ceased before the assignment, the new contract with the assignee will be considered as a compromise of the assignor's claim. Brewer, J., has thus stated the principle:⁶¹

But it is said there is really no consideration for this contract on the part of the company; that the breach of the policy by the assignor forfeited all right to the unearned premium; and therefore the company received no consideration for any promise to insure for the unexpired term. The assignment of this policy is an assertion practically by the assignor of a right to an unearned premium, and the claim of such un-
Ins. Co., 159 Mass. 119.

The foregoing cases are to the effect that any cause of forfeiture committed prior to the assignment by the assignor will not be a defense against the assignee. The *Ellis* case *supra* is the best on this point. It is by Brewer, J., and covers the whole subject.

56 The cases cited in 19 CYC 635 are largely of this kind although certain cases contain passages directly opposed to the doctrine above stated. *Wilson v. Mut. Fire Ins. Co.*, 174 Pa. St. 554. *Reed v. Windsor Co. Mut. Fire Ins. Co.*, 54 Vt. 413. Mr. Richards does not approve of the novation theory (3rd ed.), p. 355, but see J. B. Ames "Novation" 6 Harv. L. Rev. 184.

57 James B. Ames "Novation" (*supra*).

58 *McCluskey v. Prov. Wash. Ins. Co.*, 126 Mass. 306.

59 *Citizens Fire Ins. Soc. & L. Co. v. Doll*, 35 Md. 89 and *Ellis v. Council Bluffs Ins. Co.*, 64 Ia. 507.

60 *Ellis v. State Ins. Co.*, 68 Pa. 578; *Ins. Co. of N. A. v. Garland*, 108 Ill. 220.

61 *Ellis v. Ins. Co. of N. A.*, 32 Fed. 646. The three foregoing cases brought by plaintiff *Ellis* all arising out of the same fire offer the most instructive comparison in regard to the point in question.

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earned premium, presented to the assignee, is assented to by the company when it consents to the assignment. It matters not that there may have been no actual right to such unearned premium, for the recognition and compromise of a claim is consideration. Further than that, there would be the injury to the assignee as well as the benefit to the insurer to be considered.

Let us suppose that the insurance company seeks to cancel the policy in the hands of the assignee, is then the assignment to be considered an admission by the company that the premium has been paid so as to obligate it to pay the unearned portion upon cancellation? Such is a possible interpretation of Mr. Justice Brewer's words. But no reason appears why the company admits anything more by the assignment than that the obligation to pay upon the occurrence of a loss has attached. It is submitted that the above quotation was not intended to mean more than this.

Where the principle that an assignment with consent of the insurer constitutes a new contract is fully recognized, it would seem that the assignee could incur no liabilities for premiums due from the original insured. When he sues on the policy, therefore, such premiums would not be set off. Such is the case when an ordinary contract is transferred with the consent of the obligor,⁶² and the same rule would seem to be applied to insurance law.⁶³

INSOLVENCY OF COMPANY.

While there are some contrary decisions, the weight of authority supports the proposition that on the judicial adjudication of the insolvency of a stock insurance company and the appointment of a receiver the outstanding policies of the company are *ipso facto* canceled, and that a claim for a loss thereafter occurring is not a provable claim against the company. (14 Ruling Case Law, p. 853, where the principal authorities are collected.)

REQUEST BY INSURED.

Finally on this branch of the subject it should be noted that cancellation of the policy and return of the unearned premium, at the "request" of the *insured*, are mandatorily imposed upon the company by the Insurance Law (Ch. XXVIII of the Consol. Laws, sec. 122). An instructive case on what constitutes a "request" for cancellation by the insured is referred to in the footnote.⁶⁴

⁶² Lane v. Winthrop, 1 Bay, 116 (S. C.) 1 Am. Dec., 599; Mowry v. Todd, 12 Mass. 281; Thompson v. Emery, 27 N. H., 267; King v. Fowler, 16 Mass. 397; Henry v. Brown, 19 Johns. 49.

⁶³ Phillips v. Merrimack Mut. Fire Ins. Co., Tenn. Cush. 350.

⁶⁴ Boutwell v. Globe & Rutgers Fire Ins. Co., 193 N. Y. 323, reversing 117, App. Div. 104.

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II.

KNOWLEDGE AND AUTHORITY OF AGENTS AND BROKERS.

It is a general rule of the law of agency that an agent may not serve adverse interests. This principle has a very important bearing upon the numerous varieties of agent that intervene between the insurance company and its policyholders and is continuously demanding consideration in cases arising out of an exercise of the right of cancellation. While an intermediary between the two parties cannot be as to the same matter agent for both, at the same time he cannot be agent for neither. The parties must deal either personally or through their respective agents, never through strangers. Although an agent may not act for both parties in regard to the same matter, he may act for one party in regard to one matter and for the other in regard to a closely related one.

These simple propositions are involved when we consider the position of an insurance broker who, having secured insurance for a client, receives a notice from the company to cancel it. Although he was the agent of the insured to procure the insurance, he is ordinarily held not to be the insured's agent to receive a notice of cancellation.⁶⁵ It has been suggested⁶⁶ that his position is not that of an agent for the company, that he is a mere stranger and that the cancellation sought to be effected in this manner is invalid.

However, there is abundant reason and authority for the proposition that a broker may occupy such relations to an insurance company as to be its agent in many ways, including the receipt of premium moneys.⁶⁷

The custom of communicating notice of cancellation in this manner "doubtless had its origin in the desire of insurance agents to retain the good will of brokers with whom they had dealings. It is to the advantage of the broker to have the opportunity to substitute other insurance for a cancelled policy and thereby prevent the loss of his commissions or of the business of the assured his principal. There is no objection to the insurance agent favoring the broker by giving him the conduct of the cancellation, provided

65 *Hermann v. Hartford Fire Ins. Co.*, 100 N. Y., 411; *Farnum v. Phoenix Ins. Co.*, 83 Cal. 246; *Hartford Ins. Co. v. Tewes*, 132 Ill. App. 321; *American Fire Ins. Co. v. Brooks*, 83 Md. 22; *Gardner v. Standard Ins. Co.*, 58 Mo. App. 611; *White v. Connecticut Ins. Co.*, 120 Mass., 330; *Grace v. American Central Ins. Co.*, 109 U. S., 278; *Stevenson v. Sun Ins. Office* (Cal. App.), 119 Pac. 529; *Latoix v. Germania Fire Ins. Co.*, 27 La. Ann. 113; *Nat. Union Fire Co. v. Baltimore Asbestos Co.*, 89 Atl. 408; *Cheshire B. Co. v. Wilson*, 86 Atl. 26; *Kehler v. New Orleans Ins. Co.*, 23 Fed. 709.

66 *Hartford Ins. v. Tewes* (supra).

67 *Smith Lumber Co. v. Colonial Assurance Co.*, 172 App. Div. 149, 151, and cases there cited.

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the agent does not thereby sacrifice the interests of his principal, the insurance company."⁶⁸

The agency of the broker for the company is necessarily a narrow one. The ordinary agent for an insurance company is liable to his principal for failure to promptly communicate notice of cancellation to the insured⁶⁹ and his prompt communication of such notice to an intervening broker will not relieve him.⁷⁰ A broker, however, fully discharges his duty in that regard and is relieved from liability by passing the notice on to the person from whom he received the application for insurance, even though such person be another broker and not the insured himself. His liability is defined as analagous to that of a gratuitous bailee; whether he would be liable to the company even if he took no steps at all to communicate the notice of cancellation to the insured is a matter of doubt. In the case of *Condon v. Exton-Hall Brokerage Agency*, Seabury, J., uses these words:

Strictly speaking, no contractual relation existed between the plaintiff's assignors and the defendant, and in treating the defendant as if it occupied the position of a gratuitous bailee we view the case in the most favorable aspect to the plaintiff.⁷¹

Certain it is that this agency is limited strictly to the act of communicating notice of cancellation to the insured in behalf of the company. The agency is, moreover, unaffected by the circumstance that the broker receives his pay by deducting it from the premiums before sending them to the company.⁷²

WHEN BROKER IS AGENT FOR INSURED.

We have seen that the agency of the broker for the insured extends as a rule only to securing the insurance and not to receiving notice of cancellation in his behalf. He may, of course, be specially authorized to receive such notice. "If he possesses that power it arises from some actual or apparent authority super-added to the mere power to enter into the contract."⁷³ The facts which in various cases have been held to show such authority are not easy of analysis. Where the broker "had been the agent of the" insured

⁶⁸ *Sage, J.*, in *Franklin Ins. Co. v. Sears*, 21 Fed. 290.

⁶⁹ *Washington F. & M. Ins. Co. v. Chesbro*, 35 Fed. 477; *Phoenix Ins. Co. v. Pratt*, 36 Minn 409, 31 N. W. 454; *Phoenix Ins. Co. v. Frissell*, 142 N. Y., 513; *British American Ins. Co. v. Wilson*, 77 Conn., 559; 60 Atl. 293; *Norwich Union Fire Ins. Soc. v. Dalton (Tex.)*, 175 S. W. 459; *Phoenix Ins. Co. v. A. B. Banks et al.*, 169 S. W. 233; *L. R. A.* 1915 A 860; *Queen City F. Ins. Co. v. First Nat. Bk. (N. D.)*, 120 N. W. 545; 22 L. R. A. (N. S.) 510.

⁷⁰ *Franklin Ins. Co. v. Sears*, 21 Fed. 290.

⁷¹ 88 Misc., 130.

⁷² *Morris McGraw Woodenware Company v. German Fire Insurance Company*, 126 La. 32; 38 L. R. A., N. S. 614.

⁷³ *Andrews, J.*, in *Hermann v. Ins. Co. (supra)*.

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property from various companies in all to the amount of \$10,000." and where it did not appear, "that he received any particular instructions as to the companies from which he was to receive insurance or as to the rates of premium or the amount to be insured by any particular company" it was held that such additional authority was inferable.⁷⁴

As generally in questions of agency, if prior acts of the same kind by the agent have been subsequently ratified by the principal, proof of this fact will afford strong evidence of agency. Thus if the broker has in the past received notice of cancellation which the insured has recognized as valid, it will be held that his authority to do so has continued.⁷⁵ If both parties acted with knowledge of a local custom whereby the broker was generally authorized to receive notice of cancellation, it would seem that such custom may be shown to prove the agency.⁷⁶ The contract between the insured and his broker being rarely, if ever, a written one, no question arises in these cases as to the variation of a written contract by parol evidence. On the other hand, if evidence of such a custom be introduced not to show the fact that the broker had authority to receive notice of cancellation for the insured but that generally irrespective of his agency it was customary for notice of cancellation to be given to the person procuring the insurance the evidence will not be admitted.⁷⁷ Such a showing would be directly contrary to the express words of the policy that notice must be given to the insured and the admission of such evidence would be to vary the written contract by parol.

No different rule is involved in regard to the power of the broker to cancel in behalf of the insured than that in regard to his power to receive notice of cancellation from the company. If, as has been seen, a mere broker may not passively receive notice of cancellation, *a fortiori* he cannot cancel on his own initiative.⁷⁸ On the other hand, where the broker has such general agency as would allow him to receive notice of cancellation, it would seem that if he think best he may cancel on his own initiative and is "clothed with

74 *Stone v. Franklin Fire Ins. Co.*, 105 N. Y. 543. Similar cases are *Rothschild v. American Central Fire Insurance Company*, 74 Mo. 417; *Edwards v. Home Insurance Co.*, 100 Mo. App. 695; *East Texas Fire Insurance Co. v. Blum*, 76 Tex. 653; *Buick v. Mechanics Ins. Co.*, 103 Mich. 75; *Dickert v. The Ins. Co.*, 52 S. C. 412.

75 *Snyder v. Commercial Union Ins. Co.*, 67 N. J. L. 7.

76 *Benedict v. Security Insurance Co.*, 147 App. Div. 810; *Norwich Union F. Ins. Soc. v. Dalton*, 175 S. W. 459.

77 *Grace v. American Central Insurance*, 109 U. S. 278; *Standard Oil Company v. Triumph Insurance Company*, 64 N. Y. 65; *Mutual Assurance Society v. Scottish Union and National*, 84 Va. 116.

78 *American Fire Insurance Co. v. Minsker Realty Co.*, 83 Misc. (N. Y.) 1.

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full authority to act for the plaintiff in procuring, modifying or cancelling the policy in question and his acts in respect to the policy are the same as if done by the plaintiff."⁷⁹ Certain clauses, before the Standard Policy was adopted, were sometimes put into a policy allowing notice of cancellation to be given to the person procuring the insurance. In such case notice to the broker was sufficient,⁸⁰ but by an overwhelming weight of authority the more common clause that anyone procuring the insurance should be held to be agent for the insured "in any transactions relating to this insurance" was held to apply only to transactions relating to the procurement of the insurance.⁸¹

NOTICE SERVED ON BROKER.

From this general accord of authority the peculiar case of *Karelsen v. Sun Fire Office*,⁸² seems to dissent. In that case notice given to a broker by the insurance company and not communicated to the insured was held effective to cancel the policy. The case is rested rather indifferently upon any one of three grounds; that the clause in the policy similar to the one referred to made such notice effective; that the agent was a general agent, (concerning this point there is no evidence cited in the opinion that would seem to warrant such a conclusion); and lastly that although the agent did not have authority to cancel at the start, the fact that he had not delivered the policy of the insured gave him such authority. The *Hermann* case,⁸³ in the Court of Appeals of this state, holding that an agent to procure insurance is not necessarily one to cancel, is distinguished upon this last ground in these words:

The *Hermann* case (100 N. Y. 411) is not applicable, for in that case, the policy had been delivered to the assured and the authority of the brokers was at an end. While here the brokers had not as yet obtained the policies and in the *Stone* case had not made delivery to the assured. Consequently their right as well as their duty to represent the plaintiffs in all matters necessary to accomplish that which they had undertaken, remained.

Suggestions to this effect are very common.⁸⁴ In another case in New York the *Hermann* case is again distinguished as follows:

In that case the brokers had delivered the policy to the insured and

⁷⁹ *Standard Oil Co. v. Triumph Ins. Co.* supra.

⁸⁰ *Lipman v. Niagara Fire Ins. Co.*, 121 N. Y. 454.

⁸¹ *American Fire Ins. Co. v. Brooks*, 83 Md. 22; *Grace v. Am. Cent. Ins. Co.* (supra); *Von Wein v. Scottish Union and National*, 20 J. & S. (N. Y.) 490; *White v. Conn. Fire Ins. Co.*, 120 Mass. 330; *Kehler v. New Orleans Insurance Co.*, 23 Fed. 709.

⁸² 122 N. Y. 545.

⁸³ 100 N. Y. 411.

⁸⁴ *Hermann* case supra; *John R. Davis Lumber Co. v. Hartford Fire Ins. Co.*, 37 L. R. A. 131; *Rothschild v. American Central Ins. Co.*, 74 Mo. 41; *Fowler Cycle Works v. Western Ins. Co.*, 111 Ill. App. 631; *Walroth v. Hanover Fire Ins. Co.*, 139 App. Div. 407; *Hodge v. Security Ins. Co.*, 33 Hun. 583 at 588; *Ikellar v. Hartford Fire Ins. Co.*, 24 Misc. 136. If the broker hold the policy as mere bailee he will not have authority to cancel. *Cassville Roller Mill Co. v. Aetna Ins. Co.*, 79 S. W. 720; 105 Mo. App. 146.

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there was a complete ending of their agency. Had this transaction been terminated by the delivery of the policy to the plaintiff, then he alone would have possessed the power to return or to permit the cancellation of the policy. Their authority continued until they had placed the insurance for plaintiff. Whatever was necessary to bring about that result was within the compass of their power.⁸⁵

It would almost seem as if the learned judge here overlooked the fact that the brokers were agents for the insured to procure the insurance and as soon as the policy was given to them, the insurance was placed, and it would seem upon the principle of the Hermann case that then their agency ended. The rule, however, is repeatedly recognized in the authorities and even is supported by the weighty approval of Mr. Richards, who says:⁸⁶

But on the other hand, until the policy is delivered or so long as the contract rests upon a binding slip in charge of the broker, the broker may be served and he can also agree to cancellation instant in his discretion.

The general rule for which the Hermann case and Grace case,⁸⁷ in the United States Supreme Court, are leading authorities, that a broker unless some superadded power be given him is not agent to cancel, is based in the words of Justice Truax in *Von Wein v. Scottish Union and National Ins. Co.*,⁸⁸ on the principle that

An authority to make a contract for another does not carry with it by implication authority to cancel the contract, and that the ordinary broker's authority is limited to the procuring of the insurance. If the broker is actually the agent of the insured to procure the insurance his act in procuring it is as effective as if it were done by the insured himself. Moreover, a contract on a binding slip is complete and includes all the terms of the ordinary policy.⁸⁹ It cannot be said, therefore, that the mere retention of the policy postpones the closing of the contract. Such a conclusion would work a revolution in insurance law. The retention of the policy then instead of delaying the contract must operate upon the agency. The agent must have it in his power by retaining the policy to extend his own agency. Such a doctrine would seem as novel to the law of agency as its alternative would be novel to the law of insurance.

The doctrine set forth in the Karelsen case has been attacked in a very strong opinion of Shepard, J., in *Wilson v. Hartford Fire*

⁸⁵ *Ikellar v. Hartford Fire Ins. Co.*, 24 Misc. 136.

⁸⁶ *Richards on Insurance*, 3rd ed., p. 389.

⁸⁷ 109 U. S. 278.

⁸⁸ 20 J. & S. 490.

⁸⁹ *Lipmann v. Niagara Fire Ins. Co.*, 121 N. Y. 454; *Karelsen v. Sun Fire Office*, 122 N. Y. 545; and, as applied to an oral contract, *Hicks v. British American Ins. Co.*, 162 N. Y. 284.

⁹⁰ 17 App. Cas. D. C. 14.

See also *National Union Fire Ins. Co. v. Baltimore Asbestos Co.*, 89 Atl. 408; 122 Md. 121.

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Insurance Co.,⁹⁰ where referring to the Grace case he speaks as follows:

In that case, it is true that the policy had passed into the actual possession of the insured before the notice of cancellation was given to the broker, who accepted the notice and promised the surrender of the policy; but we can not agree that this fact authorizes any limitation of the broad rule of the decision. It would be inconsistent with the general principles of the law of agency, applied by that decision, to hold, that because a policy is suffered to remain in the hands of the agent for its procurement he thereby becomes the general agent of the insured—for that would be the necessary effect—with power to alter, to rescind and to accept notice of cancellation and bind the insured without his knowledge or consent. To give such effect to the mere possession of the policy, after execution and delivery, would be, not only to revive a limited agency, for no reasonable purpose, but also to extend it and invest it with powers that had not previously been given. Moreover, it would be fraught with great danger to the vast interests dependent upon insurance, without any general compensatory benefit to any other interest.

Merely permitting the policies to remain for a time and uncalled for, in the hands of the brokers, which is all that this record discloses, is perfectly consistent with the idea of the termination of their agency.

With the receipt of the policy a new relation is created between the insured and the broker, namely, that of depositor and depositary, the possession of the broker becomes, in law, the possession of the insured and nothing more; his sole duty and authority, in the new relation, is to deliver the policy upon demand of the insured or within a reasonable time without demand.

This opinion was, however, overruled on a different point in the Supreme Court of the United States in *Hartford Fire Insurance Co. v. Wilson*.⁹¹ As the ground of the reversal is likely to be confused with the question in the *Karelsen* case, it should be briefly noticed. A policy of insurance may be delivered to the brokers by the company *conditionally* upon the approval of the company, in which case the brokers being agents for the insured to procure the insurance bind their principal by the knowledge of the conditional delivery,⁹² and upon notice to them that the condition is not fulfilled, the policy which was never completely delivered never becomes effective. This rule which arises out of the complicated nature of an insurance policy, was not applied by the Court and lead to the reversal by the Supreme Court but the opinion was not criticised above on the point in hand. No question of conditional delivery arose in the *Karelsen* or similar cases.

Judge Shepard's opinion is supported by that of Circuit Judge Buffington in *Standard Leather Co. v. Northern Assurance Company of London*,⁹³ but this opinion also was overruled, this time in the Circuit Court of Appeals,⁹⁴ and also upon a different point. Judge Gray's opinion in the Circuit Court of Appeals, however, con-

⁹¹ 187 U. S. 467.

⁹² *Young v. Newark Fire Ins. Co.*, 59 Conn. 41.

⁹³ 153 Fed. 689.

⁹⁴ 165 Fed. 602.

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tains the only explanation of the rule of law that has yet been found, as follows:

Though not directly bearing upon the question of the scope of the agency in the case before us, it may be well to remark that under the situation so far as it was admittedly created by the plaintiffs the policies were left in the possession of Negley & Clark Company, while the general purpose of procuring the amount of insurance required was being transacted, and that no notice of cancellation from the defendant company directly to the plaintiffs would have been of as much advantage to the latter, as was the notice actually given to the brokers who were transacting the business and upon whom the duty devolved to procure other insurance in lieu of that covered.

This being an explanation from convenience not altogether satisfying in principle.

In a Michigan case,⁹⁵ the rule was justified on the ground that the insured by leaving the policies in the hands of the broker made a representation which estopped him to deny the agency. Under the facts of that case there is some ground for this holding, but it would seem untenable where the policy is retained only a very short time or as in the Karelsen case merely remains in binding slip.

RATIFICATION OF UNAUTHORIZED ACT OF AGENT.

It is a general rule of agency law that one may do an act in behalf of another which he was never authorized to do and yet the one in whose behalf that act was done may subsequently ratify the act and adopt it as his own. The ratification is said to relate back to the time of the act ratified.

There is no great difficulty in applying this rule to fire insurance contracts, so long as the ratification precedes a loss. Thus the act of an agent either in cancelling existing insurance or in procuring new, although in excess of his authority at the time of its execution, may be adopted and ratified.

RATIFICATION AFTER LOSS.

Where ratification is attempted after loss, however, a question arises which is not satisfactorily settled by authority. Our first impression would be that there can be no ratification after loss because, first it would be equivalent to insurance after loss, and second, because it would be a grossly unmutual situation that would permit the insured to take a policy when he could collect upon it, although the company could not oblige him to take it before the loss occurred.

It is frequently stated by text writer⁹⁶ and in dicta⁹⁷ that insur-

⁹⁵ *Koolstra v. Rockford Ins. Co.*, 122 Mich. 62.

⁹⁶ *Clement Fire Ins. Co.* 481; 1 *Wood Fire Ins.*, p. 320, sec. 136; *Mechem Agency* 2nd ed., sec. 524.

⁹⁷ *Southern Cold Storage Co. v. Dechman*, 73 S. W. (Tex.) 545; *Warring v. Ins. Co.*, 45 N. Y., 606; *Ferguson v. Pekin Plow Co.*, 141 Mo. 161.

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ance taken out by an agent without authority may be ratified by the principal even after loss. Mr. Richards (3rd ed., p. 293, but see p. 296), however, states the rule as applicable to cases where the insurance is taken out by a warehouseman, bailee, auctioneer or the like, the property insured being described as "his own or held in trust or on commission" or by some similar phrase. The rule when applied to such cases has been explained by the theory that such fiduciary has authority by custom to insure the goods of his bailor⁹⁸ or by the remark that the money represents the goods and the owner of the goods is entitled to the money.⁹⁹ In such cases the insured has an interest in the property because of his possible liability over to the owner and although the measure of such interest is the full value of the property it would be unjust for him to retain it as his own. He is accordingly regarded as trustee thereof for the owner.

It is submitted, however, that the foregoing reasons can only apply where either such customary authority exists or where the person procuring the insurance stands in a fiduciary relation to the owner of the property. Even though he have an insurable interest in the property, if that interest is entirely distinct from that of the person for whom he procures the insurance he can only have procured the insurance as agent upon the other's interest. It can make no difference that the principal's name is not mentioned in the policy, the insurance being taken out "for whom it may concern." (See, however, Richards, 3rd ed., p. 296.) The test of the rule must be the nature of the interest held by him who procures the insurance.

The broader rule dependent specifically upon ratification goes back to certain English cases. *Lucena v. Crauford*, the original authority,¹⁰⁰ was a marine case, insurance being effected "lost or not lost" but the decision does not seem to be based upon this circumstance. One of the judges who decided it, Lord Ellenborough, referred to it (in *Routh v. Thompson*, 13 East. 274 and *Hagedorn v. Oliverson*, 2 Maule & Sel. 485) as authority for the doctrine of ratification after loss. There was, however, some evidence of prior authorization and as the opinions of the judges are not reported it is not clear that it was not put in part, at least, upon the special power of the Crown to ratify the acts of its subjects. This latter point might have had also some influence in *Routh v. Thompson*, not, however, in the later case of *Hagedorn v. Oliverson*. In all of these cases the action was brought by the party procuring the in-

⁹⁸ *Southern Cold Storage Co. v. Dechman*, 73 S. W. (Tex.) 545.

⁹⁹ *Selden, J.*, in *Stillwell v. Staples*, 19 N. Y. 401.

¹⁰⁰ 1 Taunt. 325.

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surance although in *Lucena v. Craufurd*, it appears (5 Bos. & Pull., 269) that the plaintiffs had no insurable interest in themselves and in *Hagedorn v. Oliverson* it is quite clear that the plaintiff's interest such as it was, was separate and distinct from that of the person for whom the insurance was effectuated. In view of the elaborate discussion of insurable interest in *Lucena v. Crauford* (5 Bos. & Pull., 269) and the prior statute of 19 Geo. II the explanation suggested in *Norwich Ins. Co. v. Dalton*, *infra*, that wagering policies were then valid seems erroneous.

In *Williams v. North China Ins. Co.*,¹⁰¹ Cockburn, C. J., says of the foregoing cases:

The existing authorities certainly show that when an insurance is effected without authority by one person on another's behalf, the principal may ratify the insurance even after the loss is known. Mr. Benjamin asked us, as a Court of Appeal, to review those authorities. His contention was that there could only be a ratification when the principal could himself make the same contract as that ratified. Admitting that for general purposes this rule may be good, the authorities which we are asked to overrule are much too strong and of too long standing to be got over.

No case has been found specifically limiting the doctrine to marine insurance. This, it is submitted, would not be justifiable on the ground of the existence in that body of law of insurance "lost or not lost" because first, the circumstances of a principal ratifying an act of his agent with knowledge of the loss is quite different from that of taking out insurance when all parties interested are ignorant of the loss, and second, because a situation analogous to insurance "lost or not lost" may arise in fire insurance.¹⁰² It may, however, be suggested that the great number of interests that may exist in the subject matter of marine insurance makes the doctrine peculiarly applicable to that law.¹⁰³

The case of *Finney v. Fairhaven Ins. Co.*¹⁰⁴ is an American case which, like the foregoing, is inexplicable upon any other basis than that of ratification. The insured was the part owner of a ship and the policy taken out by another part owner read "for himself and other owners." The court began its opinion by observing that "it was long since determined that one part owner had no authority to insure for the rest of the owners although such part owner was also the ship's husband," and held that the insurance might be ratified by the insured after a loss.

The cases supporting the doctrine of ratification after loss are not, however, confined to marine insurance. In *Marts v. Cumber-*

¹⁰¹ 1 C. P. Div. 757.

¹⁰² *Gifford v. Queen Ins. Co.*, 1 Hanney (N. B.) 432; *Hallock v. Commercial Ins. Co.*, 27 N. J. L. 645.

¹⁰³ *Hooper v. Robinson*, 98 U. S. 528.

¹⁰⁴ 5 Metc. 192; 38 Am. Dec. 397.

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land Ins. Co.¹⁰⁶ the agent was the husband of his principal and the same doctrine was announced although it does not appear whether it was necessary to the decision. Other cases have been decided in which the agent had no interest whatever.¹⁰⁸

Mr. Frederick T. Case in an article in the *Green Bag*,¹⁰⁷ has attacked the doctrine. He looks upon it as effectuating a contract without any meeting of the minds and therefore erroneous and suggests its limitation to cases in which the person procuring the insurance has himself an insurable interest. In the opinion of the present writer such a rule is not narrow enough to be logical, nor broad enough to include the great body of authority. It is submitted also that his citation of *Stebbins v. Lancashire Ins. Co.*, 60 N. H. 65 as contrary to the doctrine of ratification after loss is erroneous as that case involved the right of an insurance agent to issue a policy for his company after a loss had occurred to his own knowledge. A suggestion has also been made that the doctrine be limited to cases where the premium has been actually paid,¹⁰⁸ and the whole doctrine has been recently repudiated in a careful opinion in *Texas*.¹⁰⁹ The argument on both sides has been well stated in *Finney v. Fairhaven*, *supra*, as follows:

It is argued that the part owners, on hearing of the safe arrival of the vessel, may refuse to ratify the act of their co-tenant, and that in consequence of their refusal the underwriters will have no claim against them for their premium, while in case of loss, the owners can enforce the contract against the underwriters; and thus there is no mutuality in the case.

This reasoning has been urged in previous cases, and though it is not without its force, yet the answer to it is, that the agent or part owner who effects the insurance is himself liable for the whole premium, because the whole property is at the risk of the underwriters, as the owners may at any time adopt the act, the policy being made for their benefit. And it may be also said that in making the contract, the insurers, having been willing to look to the part owner for their premium without calling for his authority cannot justly complain, if from any cause, the other owners, by disavowing the act, do not render themselves personally liable for the payment of the premium.

Also in *Marqusee v. Hartford Fire Ins. Co.* (*supra*) it was said

What shocks us at first blush is that one may ratify an unauthorized contract after he knows that it is to his own advantage to do so and so bind the other party to his apparent disadvantage. Further reflection, however, causes this apparent unfairness to disappear. The other party,

¹⁰⁵ 44 N. J. Eq. 478.

¹⁰⁶ *Boutwell v. Globe & Rutgers Fire Ins. Co.*, 193 N. Y. 323; *Todd v. German American Insurance Co.*, 2 Ga. App. 789; 59 S. E. 94; *Ferrar v. Western Assurance Co.*, 159 Pac. 609; *Miltenerberger v. Beacon*, 9 Pa. St. 198, arising between agent and principal; *Marqusee v. Hartford Fire Ins. Co.*, 198 Fed. 475, reversed on rehearing on different point, 198 Fed. 1023; *Phoenix Ins. Co. v. Hancock*, 123 Cal. 222; *Bauer v. Fireman's Fund Ins. Co.*, N. Y. L. J. Feb. 2, 1906.

¹⁰⁷ 19 *Green Bag*, 93.

¹⁰⁸ *Kline Bros. v. Royal Ins. Co.*, 192 Fed. 378.

¹⁰⁹ *Norwich Union Fire Ins. Co. v. Dalton*, 175 S. W. 459.

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having agreed to be bound by this contract and not having withdrawn from it has no ground to complain if compelled to perform, the original lack of authority having been cured.

A SINGLE ACT.

For obvious reasons the question of the ratification by the insured of a cancellation of a policy in his behalf does not frequently arise except when coupled with a ratification of the simultaneous procurement of a new policy in a different company. The tendency of the courts seems to be to consider such a substitution as a single act, rather than two separate acts.

RATIFICATION OF SUBSTITUTION.

Before examining this subject, which lies at the bottom of all the problems growing out of substitution of insurance, it is well to notice what is necessary to the ratification of the procurement of a policy. Where the broker told the insured of receiving a notice from the company, and that he had cancelled the policy and procured a new one and the insured then said "it didn't make any difference to him, just so he got his \$2,500 of insurance," the substitution was held to have been ratified.¹¹⁰ But in a case where the broker represented to the insured that he was protected by substituted insurance, when in fact, the substituted insurance was invalid, the assent of the insured given in reliance upon such representations was held not to amount to a ratification.¹¹¹

Ratification either of cancellation or of the procurement of a new policy need not be express, but, as is the case with an ordinary agency, may be inferred from the behaviour of the party. However, mere making of proof in both companies in the case of a substitution will not in any way bind the insured to any election and is commended as the proper and prudent practice.¹¹² Although receiving payment of the loss from the one company will apparently debar the insured from securing a second recovery from the other company¹¹³ nevertheless if the right against the second company be assigned by the insured to the company paying the loss, the question of their respective liabilities may be successfully tried.¹¹⁴

¹¹⁰ *Larsen v. Thuringia American Ins. Co.*, 208 Ill. 166.

¹¹¹ *Yoshimi v. Fidelity Fire Ins. Co.*, 99 App. Div. 69.

¹¹² *Snyder v. Commercial Union Ins. Co.* supra; *Martin v. Palatine Ins. Co.*, 106 Tenn. 323; *Hartford Fire Ins. Co. v. Tewes*, supra.

¹¹³ *Arnfeld v. Guardian Assurance Co.*, 172 Pa. St. 605.

¹¹⁴ *Excelsior Fire Ins. Co. v. Royal Ins. Co. of Liverpool*, 55 N. Y. 343; *Snyder v. Commercial Union Ins. Co.* supra; see also in which suits were brought against both companies; *Warren v. Franklin Fire Ins. Co.*, 145 N. W. 554; *Joyner & Long v. Scottish Fire Ins. Co.*, 71 S. E. 434; 155 N. C. 255; *Wygai v. Georgia Home Ins. Co.*, 147 S. W. 394; 148 Ky. 67; *Martin v. Palatine Ins. Co.* supra.

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DOUBLE INSURANCE.

If the broker is authorized to secure insurance and that already obtained does not exhaust his authority, no reason is seen why in the absence of any provision against double insurance he may not procure more and if there be a fire while both are in force, why the insured may not recover *pro rata* upon both policies, just as if he himself procured both policies.¹¹⁵ If, however, the new insurance would bring the total beyond the amount for which the broker had authority to insure, authority to secure it would imply authority to cancel that already existing,¹¹⁶ or if the broker were agent of the cancelling company operate as a waiver of notice of cancellation.¹¹⁷

In such case the insured is not allowed to recover ratably upon both policies. It would seem, however, that where the broker is not agent for the cancelling company and the fire happens within five days of the notice to the broker, the insured ought to be allowed to recover upon both.

Where the act of the agent in substituting insurance was originally unauthorized, it would seem that the insured ought to be able to ratify the procurement of the new policy but reject the cancellation of the old. No distinction appears on this point between the case where the broker is also agent for the cancelling company and where he is not. Such a partial ratification and a ratable recovery against both companies was allowed in a New York case.¹¹⁸ Other courts refuse the insured a recovery against both companies and hold that substitution is all one act and that "the ratification must be complete and of the whole transaction and the ratification of the contract for the substituted policy would necessarily carry with it a ratification of the cancellation of the old policy."¹¹⁹

AGENT OF COMPANY AS AGENT FOR INSURED.

Up to this point we have been mainly concerned with brokers and their authority. We are now briefly to consider the extent to which the company's agent may be the agent of the insured.

The statement is frequently made that an agent for an insurance company may be agent also for the insured and have authority

115 *Scheel v. German American Ins. Co.*, 76 Atl. 507; 228 Pa. 44.

116 *White v. Ins. Co. of N. Y.*, 93 Fed. 161.

117 *Warren v. Franklin Fire Ins. Co.*, 143 N. W. 554 (Ia.). What was said in this case on the question of double insurance seems to be beside the point. The policy sued upon was apparently issued by Johnson and not O'Hara.

118 *National Conduit & Cable Co. v. Commercial Union Assur. Co.*, 135 App. Div. 130; *affd.* 203 N. Y. 580.

119 *Snyder v. Commercial Union Assur. Co.*, *supra*; *White v. Assurance Co.*, 93 Fed. 61; *Lee v. New Hampshire Fire Ins. Co.*, 70 S. E. 819; *Finlay v. New Brunswick Fire Ins. Co.*, 193 Fed. 195.

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"to keep and care for," the policies, "with plenary power to keep the property insured in accordance with general directions of the insured and attend to all renewal, cancellation and replacement of insurance without consulting the assured in respects to particular policies or other details."¹²⁰ This is a hard doctrine and leads to much difficulty. Such a double agency is to be discouraged.¹²¹ Yet the validity of policies secured thereunder is established at least in Michigan¹²² and Minnesota.¹²³

Such general authority must be expressly conferred upon the insurance agent and before the fire. It seems to be generally held that ratification of a substitution of companies by a broker who is agent for both companies if made after the fire is invalid.¹²⁴ With this doctrine those jurisdictions which hold all ratification after a fire invalid have of course no quarrel.

It is submitted that the anomalous character of the relationship and the refusal of the courts to extend to it all the consequences of agency point to the incorrectness of the recognition of this double agency in any case. Where one goes to an agent for several insurance companies and asks for insurance, leaving the selection of the company to the agent, it has been affirmed¹²⁵ and denied¹²⁶ that a case of double agency arises. In such cases the validity of the insurance is generally sustained but it is believed that they are distinguished from the foregoing.

The subject has not been presented perhaps in a popular form, but it hardly admits of that kind of treatment and, whatever may be the rule in medicine, enantiopathy and not homeopathy is the better practice when accurate treatment of a difficult and technical subject is desired.

¹²⁰ *Kerr v. Milwaukee Mech. Ins. Co.*, 117 Fed. 442; see *Johnson v. North Br. & Merc. Ins. Co.*, 63 N. E. 610; 66 Ohio St. 6.

¹²¹ "Reynolds by employing him in this double and anomalous capacity, directly contributed to producing the complication. The whole arrangement whereby Kirchhofer procured the insurances by extra inducements to Reynolds in the way of sharing the commissions on premiums had a tendency to lessen his vigilance in guarding the company's interests and taking doubtful risks and the credit arrangements were in the same direction." *Campbell, J.*, in *Hartford Fire Ins. Co. v. Reynolds*, 36 Mich. 502 at 508.

¹²² *Dibble v. Northern Assurance Co. of London*, 37 N. W. 704; 14 Am. St. Rep. 470; 70 Mich. 1.

¹²³ *Hamm Realty Co. v. N. H. Fire Ins. Co.*, 80 Minn. 139; 83 N. W. 41.

¹²⁴ *Stebbins v. Lancashire Co.*, 60 N. H. 65; *Massasoit Steam Mills v. Western Assurance Co.*, 125 Mass. 116; *Wilson v. N. H. Fire Assurance Co.*, 140 Mass. 210; *Hartford Fire Ins. Co. v. McKenzie*, 70 Ill. App. 615; *Commercial Union Assurance Co. v. Urbansky*, 113 Ky. 624, 24 Ky. Fed. Rep. 462; 68 S. W. 653; *Clark v. Ins. Co.*, 89 Me. 26; 35 Atl. 1008; 35 L. R. A. 276; *Nabors v. Commercial Union Assn. Co.*, 51 So. 429; 125 La. 378; nothing has been found in the report of *Larsen v. Thuringia American Ins. Co.*, 208 Ill. 166 (cited by Mr. Richards as contra the above doctrine), to show that the broker Bennett was also agent for the North Br. & Merc. Ins. Co., the substituted company in that case.

¹²⁵ *Norwich Union Fire Ins. Soc. v. Dalton (Tex.)* 175 S. W. 459.

¹²⁶ *Br. Am. Assurance Co. v. Cooper*, 58 Pac. 592; *Mich. Pipe Co. v. Mich. Fire & Marine Ins. Co. (Mich.)* 20 L. R. A. 277.

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In conclusion, I express my thanks to my associate, Mr. Henry T. Hall, for the painstaking research, without which this paper would not have been possible, and to Mr. W. J. Nichols of the North British & Mercantile, and Mr. W. N. Bament of the Home, for their helpful suggestions as to topics to be treated.

REFERENCES

Cooley's Briefs. Richard on Ins. Clement's Digests. Cases cited in the text and Court decisions there referred to; Legislative Enactments.

NOTE

O'Neil v. Franklin Fire Ins. Co., will be argued in the N. Y. State Court of Appeals in October, 1915.

The case of Equitable reformation cited has since been reversed by the Court of Appeals in Solomon v. North British & Fire Ins. Co., N. Y. Court of Appeals June, 1915.

On the question of co-insurance the Supreme Court Appellate Division Second Department the case of Hartwig v. American Insurance Company, N. J., has just decided that the mortgagee is bound by the co-insurance clause to the same extent as the assured owner.

XI

THE INTEREST OF A MORTGAGEE UNDER A POLICY OF FIRE INSURANCE

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When it is considered that fully sixty per cent of all the real estate in this country is encumbered to a greater or less extent by mortgage, and that the lenders of money thereon almost invariably insist upon having the improvements covered by policies of fire insurance payable to them as collateral security, it is at once apparent that the subject of this address is one of exceedingly great interest to the vast number of corporations and individuals who loan money on real estate, and of scarcely less interest to the underwriters who issue policies thereon.

It has been the aim of insurance companies to meet the peculiar requirements of these mortgagees in respect of insurance, by giving them special forms of contract, exceedingly liberal in their terms, and in so doing they have in some instances gone to unreasonable lengths, and far beyond what was originally contemplated, in protecting said interests. And in the light of the interpretations which have been placed upon the provisions in favor of the mortgagee, it will be perfectly safe to say that if there is a more highly favored party to any contract than a mortgagee under a policy of fire insurance, he has not yet been discovered. Whenever he has asked he has received, whenever he has sought he has found, and whenever he has knocked it has been opened unto him either by the insurers themselves or by the courts, for what the former have omitted, the latter have supplied.

In Maine, Massachusetts, Mississippi and North Carolina, the mortgagee has, by statute, under certain conditions, a lien against the insurance money due the mortgagor. In Louisiana a clause is used making loss if any payable to the holder or holders of the mortgage notes. In New York city the loss is made payable to the original mortgagee, or the owner of the mortgage at the time of the fire, the former, however, agreeing upon request to inform the insurer of the name and address of the party to whom it may have been assigned. In New England the loss is made payable to the mortgagee as his interest may appear under present and all future

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mortgages covering the premises. In the West the loss is made payable to the mortgagee or his assigns. In Canada the policy is continued in force for the benefit of the mortgagee after expiration, and until the mortgagee or the insurer serves notice of cancellation; the mortgagee, however, being liable for the premium for the extended period. In Mississippi the standard mortgagee clause is written into the policy by operation of law. Sec. 2596 of Code—*Bacot v. Phenix Ins. Co.* 96 Miss. 223, 50 So. Rep. 729.

If a mortgage contains an agreement that the mortgagor shall keep the mortgaged property covered by insurance for the benefit of the mortgagee, and for any reason he fails to have the loss made payable to him, the mortgagee has an equitable lien against any insurance that the mortgagor may have, and if the insurer receives notice of such lien before making payment, he will ignore it at his peril. *Wheeler v. Insurance Co.* 101 U. S. 439, *Aetna Ins. Co. v. Thompson* 68 N. H. 20, 40 Atl. 396, *Swearingen v. Hartford Fire Ins. Co.* 52 S. C. 309, 29 S. E. 722, 56 S. C. 355, 34 S. E. 449.

In several states it has been held that the short form "loss payable" clause is nothing more nor less than an unconditional agreement to pay the mortgagee in event of loss, and if there are any privileges and advantages he does not possess, it is either because he has not yet thought of them or has not demanded them. And more remarkable still is the fact that for all this the mortgagee pays nothing whatever. He gets without money and without price a contract which the mortgagor or owner of the best risk in the land cannot buy at any price.

The mortgagee, however, is entitled to absolute protection from acts and conditions outside his knowledge and beyond his control, and if the insurer is willing to grant this protection without extra premium, no criticism can attach to the mortgagee if he gracefully accepts the benefits thus generously bestowed. In fact, the writer entertains the hope, perhaps a forlorn one, that some time he himself may emerge from his normal condition of mortgagor and become a member of the mortgagee class with its attendant benefits.

In the year 1858 the large insurance companies and other loaning institutions, received quite a severe shock and rather a rude awakening by two decisions which were handed down by the Court of Appeals of New York. Prior to that time, by reason of decisions rendered in 1832 and 1851, it had been their custom to accept fire insurance policies as collateral security with the short form clause "Loss, if any, payable to——mortgagees as their interest

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may appear," or to have the policies assigned to them for collateral purposes with the consent of the insurers, in the belief that their interests could not be adversely affected by any act or neglect on the part of the mortgagor or owner.

The decisions referred to are *Grosvenor v. Atlantic Fire Insurance Co.* (17 N. Y. 391) and *Buffalo Steam Engine Works vs. Sun Mutual Insurance Co.* (17 N. Y. 401). The former was a case involving the "loss payable" clause, and the latter one involving an assignment of the policy to the mortgagee, the court in both instances holding that the mortgagee was merely the appointee of the party insured, to receive the money which might become due him from the insurers upon the contract; that the "loss payable" provision in the policy in favor of the mortgagee had no more effect upon the contract than it would if it had provided that the loss for which the insurer should become liable should be deposited in a specified bank to the credit of the party insured. The rule of construction thus adopted by the New York Court was followed in other jurisdictions and naturally spread consternation among the large lenders of money on real estate, because the security, which they had hitherto regarded as absolute, was by these sweeping decisions found to depend upon conditions of which they had no knowledge and over which they had no control. This situation was of course intolerable, and it became necessary for mortgagees either to take out special policies of insurance covering their mortgage interests or secure some special form of contract in their favor to attach to the policies of the property owners. The outcome was the adoption of a special mortgagee agreement, substantially the same as the present standard mortgagee clause, which however, did not come into general use until some years later.

In the year 1886 the New York Standard Fire Insurance policy was adopted by the legislature of that state, together with a number of permissible riders, among which were three mortgagee agreements, one known as the "New York Standard Mortgagee Clause without Contribution," another the "New York Standard Mortgagee Clause with Full Contribution" and a third the "New York Standard Mortgagee Clause when owner has no interest in the insurance." The first two are exactly the same in phraseology, except that one contains the contribution clause which reads as follows:

In case of any other insurance upon the within described property, this Company shall not be liable under this policy for a greater proportion of any loss or damage sustained than the sum hereby insured bears

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to the whole amount of insurance on said property, issued to or held by any party or parties having an insurable interest therein, whether as owner, mortgagee or otherwise.

This contribution clause has been the subject of two leading cases of absorbing interest in insurance litigation, to which attention will be directed later.

Two of these mortgagee clauses provide that the interest of the mortgagee shall not be invalidated by any act or neglect of the mortgagor or owner, nor by foreclosure proceedings, change of title or ownership, or increase of hazard, provided the mortgagee notifies the company of such changes or increase in hazard which may come to his knowledge, and pays premium therefor, and provided also that the mortgagee shall pay the premium in event of default by the owner; also for cancellation, and for subrogation in event of non-liability to the mortgagor or owner.

The third mortgagee clause is intended for use where the policy is issued direct to the mortgagee covering his interest only, and contains a provision for subrogation. This latter clause is seldom used, but if a policy is issued direct to the mortgagee, he is "the insured" and is bound by all the terms and conditions of the policy.

The New York Standard Policy and its collateral agreements have been formally adopted by a number of other states either verbatim or with slight modifications, while others have adopted standard forms differing materially therefrom, but it is safe to say that in all the United States, aside from those which have standard policies of their own, fully seventy-five percent of the policies issued are the New York Standard. It would seem that this approach to uniformity in contract should be attended with something approaching uniformity in court decisions, but such is not the case, because the courts of the various states differ with each other on many points and the federal courts have differed radically with the New York Court of Appeals in the interpretation of several very important conditions, one of which bears directly upon the interest of the mortgagee.

The storm center of most of the litigation which has taken place in connection with the interest of the mortgagee is to be found in lines 56 to 59 of the policy, which read as follows:

If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached or appended hereto.

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This paragraph has been to some courts a stumbling block and the subject of considerable criticism on account of its ambiguity, and if it were not in the policy, or if the intention of its authors had been more clearly expressed, much of the litigation which has taken place would have been avoided.

There are three leading cases involving the question of contribution under the mortgagee clause, two by the New York Court of Appeals and one by the United States Circuit Court of Appeals.

The first is that of *Hastings v. Westchester* (73 N. Y. 141) decided by the New York Court in 1878. One policy, the Westchester, was issued to the owner with loss payable to the mortgagee; the other, the Lycoming, was issued to the insured with loss payable to himself. The mortgagee clause itself did not contain any provision for contribution, and the company relied upon the contribution clause in the printed conditions of the policy. Suit was brought against the Westchester by the mortgagee, who claimed the full amount of loss from that company. The court held that by reason of the mortgagee clause, the policy operated as an independent insurance of the mortgagee's interest and that the Westchester was liable for the full amount of the loss, but was entitled to subrogation, for what it might be worth, to the extent of the excess which it was compelled to pay over and above its pro rata liability to the insured. Whether the Westchester by reason of its subrogation rights, could, for its indemnity, have any recourse against the proceeds of the policy in the Lycoming Insurance Company was a question which the court did not feel called upon to decide, and no court has attempted to do so since. The question did not come up again for sixteen years, but in the same month of the same year, to wit; October, 1894, the New York Court of Appeals decided the case of *Eddy v. London Assurance Corporation et al.* (143 N. Y. 311) and the United States Circuit Court of Appeals rendered its decision in the case of *Williams, Trustee v. Hartford Fire Insurance Co.* (63 Fed. 925), both involving the question of contribution under the mortgagee clause.

It will be remembered that in the case of *Hastings v. Westchester* the mortgagee agreement did not contain the contribution clause. In the *Eddy* case some policies contained the mortgagee clause with full contribution and some contained the clause without contribution, while others were payable direct to the insured. In the *Williams* case the policy contained the mortgagee clause with full contribution so that, with respect to the clause with full con-

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tribution, the two cases were on all fours with each other, yet these two courts of last resort reached diametrically opposite conclusions, neither knowing the views of the other.

The lines of reasoning adopted by these eminent tribunals in reaching their respective decisions will be found interesting. The New York Court said that the words "the interest of the mortgagee shall not be invalidated" should not be given a narrow, but on the contrary, a broad interpretation, and meant that the interest of the mortgagee should not be injuriously impaired or affected by the act or neglect of the owner; that in order to constitute double insurance, the policies must cover the same interest in the same property or some part thereof; that although the contribution provision was inserted as a part of the mortgagee clause, and called for contribution from the whole insurance on the property held by any party or parties having an insurable interest therein, whether as owner, mortgagee or otherwise, this provision was inconsistent with the primary promise that the interest of the mortgagee should not be impaired by the act or neglect of the owner, and that the primary promise must prevail. The court admitted that this view might not give full effect to the strict language of the contribution clause, but held that taking the contract as a whole, it was unreasonable to suppose that the parties intended to permit the interest of the mortgagee to be adversely affected by the secret act of a third party, and that the contribution clause must be limited in its operations to the insurance held by or consented to by the mortgagee.

The Federal Court in its decision said that the particular language employed in the mortgagee clause respecting contribution, seems to have been inserted for the express purpose of making it clear that the mortgagee's policy was entitled to pro rate with all policies covering the property which at the time of the loss might be held by any person whomsoever had an insurable interest in the property; that in the absence of the words "issued to or held by any party or parties having an insurable interest therein," it might no doubt be fairly argued that it was simply the intention of the parties to reserve the right to pro rate with other policies procured by the mortgagee for the protection of his interest, but the use of the words quoted rendered that construction inadmissible; that those words appear to have been added out of abundant caution that there might not be any room for doubt on the subject. The court further said that it would not be justified in ignoring an agreement in one part of the instrument, which is as clearly expressed

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as language could well express it, merely because it limits to some extent the scope of general language employed in another part of the instrument. It further surmised what is undoubtedly true, that the contribution clause was phrased precisely as it is, and inserted as a part of the mortgagee clause itself for the purpose of remedying the defect brought out in the case of *Hastings vs. Westchester*, and for the sole purpose of securing the contribution which was denied in that case.

Two courts of such prominence having differed with each other, the question which naturally presents itself is, which is the better law? Although the mortgagee should have absolute protection in the matter of his insurance, unaffected by the acts of omission or commission on the part of third persons, and while it is true that under the interpretation placed upon the contribution clause by the Federal Court, his interest might in certain circumstances be very materially impaired, yet, to use a favorite expression of the judiciary, it is the province of courts to construe contracts, not to make them. It seems, however, that the New York Court of Appeals in the *Eddy* case went out of its way to amend the existing contract by virtually eliminating therefrom the words "issued to any party or parties having an insurable interest therein." There is no ambiguity, no language could be plainer and it is impossible to conceive of any object that the parties could have had in using those words other than to avoid the very construction of the clause which the Court of Appeals adopted.

The Federal decision was legally sound, but the contribution provision contained in the standard mortgagee clause is not fair to the mortgagee, and it should be amended so as to permit contribution from those policies only, which are payable to, held by or consented to by the mortgagee; for otherwise he will not, in many instances, have the security to which he is justly entitled.

See also *Hardy v. Lancashire Ins. Co.* (1896), 166 Mass. 210, 33 L. R. A. 21, 44 N. E. 209; *Sun Ins. Co. v. Varble* (1898), 103 Ky. 758, 27 Ins. Law Journal 798; *Germania Fire Ins. Co. v. Bally* (1918), 173 Pac. 1052.

A short time after the standard policy went into general use, the insurance companies and the framers thereof received about as great a shock as the mortgagees had received years before, the occasion being a remarkable decision rendered by the Supreme Court of Nebraska in the case of *Oakland Home Ins. Co. v. Bank of Commerce* (47 Neb. 717), in which it was held that under the

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short form "loss payable" clause, the mortgagee is not bound by any of the conditions of the policy whatsoever. According to the interpretation placed by the court upon lines 56 to 59, if the company desired any of the policy conditions to apply to the interest of the mortgagee, it would be necessary for those conditions to be specially written upon, attached or appended to the rider, and inasmuch as no conditions were so appended, or included in the "loss payable" clause, either by reference or otherwise, the mortgagee virtually possessed an unconditional contract, and in the absence of fraud on his part, the company had no alternative but to pay the loss. The court commenting upon lines 56 to 59 used the following language:

And even if there be doubt as to the correctness of this construction, there is some satisfaction in the fact that an insurer who puts such a nondescript provision into his policy should hardly be heard to object to any kind of construction which any one chooses to give it.

Six other states, to wit; Mississippi, Iowa, Washington, Missouri, California and Ohio have rendered similar decisions. Several judges dissented and Mr. Freeman, the learned annotator says that these cases go to the extreme, if not questionable limit, in upholding the rights of the mortgagee, where there is no clause in the policy securing the mortgagee against any act or neglect of the mortgagor—*East v. New Orleans Ins. Ass'n.* 76 Miss. 697, 26 So. Rep. 691; *Christenson v. Fidelity Ins. Co.* 117 Iowa 77, 90 N. W. 495, 94 Am. St. Rep. 286; *Boyd v. Thuringia Ins. Co.* 25 Wash. 447, 65 Pac. 785, 55 L. R. A. 165; *Senor et al. v. Western Millers Mut. F. Ins. Co.* 181 Mo. 104, 79 S. W. 685, 33 Ins. Law Journal 455; *Welch v. British America Assur. Co. (Cal.)* 82 Pac. 964; *Farmers Natl. Bank v. Delaware Ins. Co. (Ohio)* 83 O. S. 309; 40 Ins. Law Journal 1248.

According to these decisions it is quite evident that in those states the short "loss payable" clause is much more favorable to the mortgagee than the standard mortgagee clause itself, for the latter does reserve some few rights to the insurer, while the former reserves none.

Various suggestions have been made as to how the "loss payable" clause should be amended so as to meet the conditions brought about by these decisions, and in this connection it is important to note that in none of the cases referred to did the clause contain any reference to the conditions of the policy.

The following has been suggested:

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Loss, if any, payable to.....mortgagee, as interest may appear, subject, nevertheless, to all the conditions of this policy.

but this has been objected to on the ground that on its very face it creates a distinct contract with the payee, which it is desirable to avoid, but the answer to this criticism is that the several courts, whose opinions we have been considering, have practically decided that lines 56 to 59 of the policy have that effect as soon as a "loss payable" clause is placed on the policy. And, although a mortgagee under the "loss payable" clause is not an "insured," yet the New York Court of Appeals has ruled that he is bound by all the policy conditions prior to line 56, but is not bound by those after line 60. *MacDowell v. St. Paul F. & M. Insurance Company*, 207 N. Y. 472. And all courts without exception which have passed on the question (and they are numerous) have held that the mortgagee payee is entitled to notice of cancellation. Another objection is that by making the policy subject to all the conditions of the policy, we simply re-affirm lines 56 to 59, which brings us back to where we started from.

Another suggestion is:

Any loss which may be ascertained to be due the assured under this policy, shall be held payable to.....as interest may appear. It being understood and agreed that there is no contract under this clause or policy with.....except as relating to the payment of money due the assured.....

And still another is:

Loss, if any, payable to.....as interest may appear. This endorsement shall be held to vest in said payee no right or interest in this insurance save as the appointee to receive the amount, if any, which may become due the assured hereunder, in the event of loss, any condition of the policy to the contrary notwithstanding.

The latest suggestion is as follows:

It is hereby agreed that such loss or damage as shall have been ascertained and proved to be due under all the conditions of the within policy to.....(which conditions are hereby by reference incorporated into, and made applicable to the payee herein named as a part of this agreement as fully as though written at length herein), shall be held payable to.....

In this connection it is interesting to note that on December 7th, 1918, the Supreme Court of Kansas rendered a decision in the case of *Burns v. Alliance Co-operative Insurance Company*, 176 Pac. Rep. 985, Vol. 33 Ins. Law Journal 229, and held that the words—"Subject, however, to all the terms and conditions of this policy and the by-laws of this Company," were sufficient to relieve the insurers from liability to the mortgagee-payee when the policy was void as to the owner. The court quoted from the decision of the

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Supreme Court of California in the case of *Welch v. British America Assurance Company*, 148 Cal. 227, on this point as follows:

It would not be necessary to write them out in full upon the policy, which would be practically impossible. A few words, making the provisions, or certain of them, as was desired, applicable to the other interest, could readily be inserted in the slip containing what is called the "loss payable" clause attached to the policy.

The State of California has solved the difficulty quite effectually in its standard policy by leaving out the paragraph contained in lines 56 to 59 of the New York Standard policy and this is probably the simplest and most effective way of remedying the defect. It has also been left out of the new standard policies in the States of Pennsylvania, North Carolina, South Carolina, and New York. This, of course, cannot be done except in non-standard policy states.

In striking contrast to the foregoing decisions may be mentioned the case of *Atlas Reduction Co. v. New Zealand Insurance Co.*, decided by the United States Circuit Court of Appeals, Eighth Circuit, April 24, 1905. The policy covered both the realty and personalty and contained the following clause: "Subject to all the conditions of this policy, loss, if any, payable to G. B. Dodge and A. M. Stevenson, as their interest may appear," two mortgages, one of the realty and the other of the chattels having been executed by the Reduction Company. It was held that the endorsement is a common method of furnishing security to a creditor, but does not make a new contract with the payee, or waive any policy condition; that the payees were the simple appointees of insured to receive any payment that might be due to the extent of this interest; that the endorsement did not give consent to a chattel mortgage to D. and S. contrary to a provision in the policy that it should be void in case of such mortgage; that oral testimony was not admissible to show that the agent intended the endorsement as a consent to such mortgage; that where the entire policy, by its terms, was void in case of such mortgage, there could be no recovery. Vol. 34, *Ins. Law Journal*, page 805, 121 Fed. 929.

It will be noticed that the clause in this case contained the words "subject to all the conditions of the policy," whereas in the other cases referred to, they were omitted. The prevailing opinion of Justice Van Devanter and the dissenting opinion of Justice Hook, with the authorities cited, are well worth a careful study.

One of the most interesting questions connected with this subject is whether a mortgagee under the mortgagee clause is bound by the conditions of the average or coinsurance clause. If he is,

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the adverse result to the insurers on account of their inability to apply the contribution clause to the mortgagee's interest, would, by reason of the general use of average or coinsurance conditions, be in a large measure neutralized.

One leading authority has expressed the opinion that the interest of the mortgagee cannot be affected by a co-insurance clause unless it is made to appear in clear and explicit terms that the mortgagee agrees to be bound by the provisions of the clause as a part of his contract with the company. While apparently admitting that it is a close question, this authority is led to the above conclusion partly on account of the attitude of the Court of Appeals in the case of *Farmers Feed Co. v. Scottish Union and National Insurance Co.* (173 N. Y. 241). It is not contended that the questions are on all fours with each other, but in view of the trend of the judicial mind as set forth in the *Farmers Feed Company* and other cases, it is thought that the court would treat the interest of the mortgagee under the mortgagee clause as free from co-insurance limitations.

Another eminent authority has expressed the opinion that the mortgagee would not be bound by the co-insurance clause as applied to the value of the property, and if applicable at all, it would apply only to the value of the mortgagee's interest, just as the co-insurance clause, under an excess floating policy in practice is made to apply only to the excess value, and under a rent policy or use and occupancy policy to the value of the interest insured; in short, that the words "value of property" would be construed to mean "value of interest."

According to still another authority, we are not warranted in assuming or admitting that the mortgagee is exempt from co-insurance conditions as applied to the value of the property. He says that the short payee clause by itself has been passed upon many times by the courts and for over fifty years it has been held in New York, and many other states, that under such a clause, although it contained the phrase "as interest may appear," the mortgagee can recover only what the mortgagor would be entitled to "under the policy." This payee clause does not purport to define the amount payable to a mortgagee other than by reference to the policy itself, and further to declare that it shall not exceed the amount of the mortgagee's interest. The mortgagee clause gives the plainest sort of notice that it is only "loss under the policy," that is to say, loss subject to the terms and provisions of the policy, that is payable to

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the mortgagee, with the single exception that certain classes of forfeiture are not to be exacted as against the mortgagee.

A recent decision by the highest court in New York holds that the mortgagee is not bound by those conditions of the policy affecting the situation after a loss (lines 60 to 112), but imply that he is bound by the preceding conditions (lines 1 to 55) except as modified by the mortgage clause. *Heilbrunn v. German Alliance Ins. Co.*, 202 N. Y. 610, 95 N. E. 823, (*infra*.) The average or co-insurance clause, however, is a part of the contract and when the mortgagee accepts the policy with such a clause therein, it is his own voluntary act. He should be as much bound by it as by the amount of the policy, date of expiration and description of the property. This imposes no hardship upon him; his interests are not placed at the mercy of third parties and the arguments which have been advanced against the operation of the contribution clause do not apply. He can insist upon insurance payable to himself being taken out equal to the stated percentage of the value of the property and thereby secure absolute protection, and it is the rule with certain large loaning institutions to insist upon this in order to meet the necessities of each case, unless they regard their security as ample without it. One exception, however, should be noted. If extraordinary improvements and repairs are made to the building after a policy is issued, without the knowledge of the mortgagee, thereby materially increasing the value of the property, this would be an act of the owner by which the mortgagee would not be bound.

We have here three different views on this subject expressed by high legal and lay authorities, but in July, 1915, the Appellate Division, Second Department of the Supreme Court of New York in the case of *Hartwig v. American Insurance Co. of Newark*, 154 N. Y. Supp. 801, 46 Ins. Law Journal 455, handed down a unanimous decision holding that the average or co-insurance limit of liability is binding on the mortgagee and used many of the arguments advanced in the view last expressed. The court held that the mortgagee clause does not contain the whole contract made with the mortgagee; that the amount of insurance agreed to be paid by the insurer is not a condition but an integral part of the policy, limiting its liability, as to any one, to the proportion of the loss it undertakes and agrees to pay. It further held that the legal effect of the standard average clause is to make the liability of the insurer the same as if the words in the policy "to an amount not exceeding \$1,500.00" together with the 80 per cent average clause,

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had been omitted from the policy, and in lieu thereof had been written the words "to an amount not exceeding the sum of \$1,500, if such direct loss or damage equals 80 per cent of the actual cash value of the property insured at the time such loss shall happen, and, if not, such proportion of any loss or damage to the property described herein as such sum of \$1,500.00 bears to 80 per cent of the actual cash value of said property at the time of such loss." This case was not appealed.

A similar decision was rendered in April, 1919, by the United States District Court of Eastern District Pennsylvania in the case of Pennsylvania Company for Insurance on Lives and Granting Annuities v. Aachen & Munich Fire Ins. Co., 257 Fed. Rep. 189, Sept., 1919. *Ins. Law Journal*, p. 291.

In the City of New York, probably on account of the decision in the Eddy case, (*supra*), the use of the mortgagee clause with full contribution seems to have fallen into disuse and to have been superseded by the clause without contribution. The question, therefore arises whether in the state of New York, in view of the decision of the Court of Appeals, the contribution clause possesses any virtue whatever and whether, as a practical proposition, it makes any difference which of the two clauses is used. Seventy-five years ago the contribution provision now contained in the printed conditions of all fire insurance policies, had not come into general use, and in event of partial loss, a claimant could, if he desired, collect the entire amount of his loss from any one of his insurers, not exceeding of course the amount of its policy, and that company would look to the other companies for their pro rata proportion of the claim. We have seen that in the Hastings case the mortgagee is not bound by the contribution clause in the policy, and in the Eddy case that the contribution clause in mortgagee agreement applies only to policies payable to the mortgagee, or consented to by him. In the Heilbrunn case (*infra*), we find that the contract, so far as the mortgage is concerned, stops at line 59 and that the succeeding conditions, among which the contribution clause appears, is not binding upon him. If, therefore, there be no contribution provision in the mortgagee clause, and the mortgagee should desire to collect the entire amount of his loss from any one of his insurers, there would seem to be nothing to prevent his doing so, although he would hardly care to exercise this right unless some of his insurers should, by reason of a severe conflagration or other-

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wise, become insolvent. This is a somewhat remote contingency, although large conflagrations are occurring with too great frequency, and it is simply mentioned as one of the possibilities under the mortgagee clause which does not contain the contribution provision.

That the interest of the mortgagee is quite a live question is evidenced by the fact that the September, 1911, issue of the "Insurance Law Journal" reported three cases and the October issue one case, touching various phases of the subject, but by far the most interesting and most important was that of *Heilbrunn vs. German Alliance Insurance Co.*, decided by the New York Court of Appeals, to which reference has been made, affirming the majority opinion of the Appellate Division, 202 N. Y. 610, 95, N. E. 823. The court decided that the mortgagee's interest is not affected by any of the policy conditions following line 59, which relate to conditions after a fire, and as most of the conditions preceding line 59 are either modified or nullified by the mortgagee clause, he comes pretty close to having a conditionless contract. It follows from this that in the State of New York a mortgagee is under no obligation to give the company any notice of loss, nor furnish proof of loss, nor submit to appraisal or examination of any kind. He is not bound by the conditions of the contribution clause and can bring suit at any time within the statutory limit of six years. The court admitted that insurance companies ought to have more protection in the matter of time within which actions upon their policies must be brought and possibly in other respects, but that relief must come, if at all, from the legislature through modification of the standard policy. The dissenting opinion of Justice McLaughlin in the Appellate Division is a masterly effort and presents the most rational construction of the standard policy that has yet appeared. The Supreme Court of Ohio, in the case of *Erie Brewing Co. v. Ohio Farmers Insurance Co.* (Ohio, 1909), 89 N. E. 1065, Vol. 39 Ins. Law Journal 200, rendered an opinion similar to that of Justice McLaughlin, and swung the pendulum so far in the other direction as to hold that the mortgagee under the mortgagee clause was bound by an award of appraisers to which he was not a party and of which he had no notice. The New York Court of Appeals has held to the contrary on this point even under the "loss payable clause." *Hathaway v. Orient Ins. Co.* 134 N. Y. 409, (infra.) The Court of Appeals in its decision in the *Heilbrunn* case (supra) said:

But the difficulty is that the language of those stipulations or condi-

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tions of the policy which relate to the proceedings after the liability of the company has accrued through the fire, does not enable us to apply them to the mortgagee in such part only as may be practical or expedient. We must hold (unless our decision be wholly arbitrary) that all those stipulations which in terms relate to the mortgagor only, apply equally to the mortgagor and mortgagee, or we must hold that none of them do. The former dictates that which is impossible and the order of the Appellate Division in this case should therefore be affirmed.

After reading this decision in connection with that of the Appellate Division which it affirms, and the strong dissenting opinion of Justice McLaughlin, one cannot help wondering whether, if the interests of the mortgagee rather than those of the insurance company had been adversely affected, the situation might not in some manner have been saved from the realm of the impossible. The court in the Eddy case experienced no difficulty whatever in actually striking out of the contribution clause a certain inconvenient phrase which was as plain as language could make it, on the ground that the only meaning which could reasonably be given it could not possibly have been intended. That the legislature intended, for obvious reasons to grant to the mortgagee a somewhat more liberal contract than to the property owner, cannot be doubted, but that it for one moment intended when it adopted a standard statutory form of policy which the title to the act shows was established as a "uniform policy" for all parties, to single out this one class, to wit; mortgagees, and exempt them from all the usual obligations which all other insured citizens must observe, is inconceivable.

Line 58 indicates very clearly that it is only "the conditions hereinbefore contained" that can be modified by the mortgagee clause or rider, and the Supreme Court of Ohio in its well considered opinion (*supra*) says:

It would appear reasonable that in respects not modified or limited by the express language of the mortgagee clause, the plain provisions of the policy must prevail and be observed.

This is a reasonable interpretation of the contract even if no consideration be given to the intention of the legislature, but in New York the court of last resort has spoken and the law in that state has therefore been determined. In the Eddy case the court found it possible to arbitrarily decide contrary to the manifest intention; in the Heilbrunn case it found it impossible to arbitrarily decide according to the undoubted intention.

After rendering the sound decision to which reference has been made, the personnel of the Supreme Court of Ohio underwent a change and in a very crude and ill-advised opinion, held that the mortgagee could recover, even though the policy might be void as

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to the mortgagor, and this too under the ordinary "loss payable" clause. *Farmers National Bank v. Delaware Insurance Co.* (83 O. S. 309), 40 *Ins. Law Journal* 1248. This is the seventh state which has placed this interpretation upon lines 56 to 59.

It has been seen that under the forms of policy in use prior to the adoption of the New York Standard, the plain "loss payable" provision, in the absence of the mortgagee clause, did not import an agreement to pay the mortgagee independent of that to pay the "insured" or the mortgagor; that is, if the policy had been rendered void as to the mortgagor or owner, it became void as to the mortgagee also. The rule is the same in the case of the standard form. *Moore v. Hanover Fire Ins. Co.* 141 N. Y. 219, 36 N. E. 191, but, the words "first payable" and "as his interest may appear" import that the interest of the mortgagee is greater than the interest of a mere naked appointee, *Pitney v. Glens Falls Ins. Co.*, 65 N. Y. 6. He would be a necessary party to an action on the policy brought by the mortgagor. *Lewis v. Guardian Fire & Life Assurance Co.* 181 N. Y. 392, 74 N. E. 224, 106 *Am. St. Rep.* 557. He is not bound by a settlement of a claim to which he has not assented. *Hathaway v. Orient Ins. Co.*, 134 N. Y. 409, 32 N. E. 40, 17 *L. R. A.* 514.

The rights of the mortgagee under the plain "loss payable clause" are clearly set forth in the unanimous opinion of the Court of Appeals of New York in the case of *McDowell v. St. Paul F. & M. Ins. Co.*, 207 N. Y. 482, Vol. 42 *Ins. Law Journal* 796, where the court decided that the mortgagee is not precluded from recovery of loss incurred because the mortgagor refused to make proof of loss as required. The court said that it was reasonable that those conditions which affect the risk, while it is subsisting, should apply alike to mortgagor and mortgagee, unless the parties have stipulated otherwise by attaching a mortgagee clause, but that it was unreasonable after a loss had occurred, that the interest of the mortgagee should be subject to the caprice of the owner, and that was equally true whether there was a mortgagee clause or merely a "loss payable endorsement." The natural inference to be drawn from this decision and that of *Hathaway v. Orient Ins. Co.* (*supra*) is that under the "loss payable" clause, as well as under the mortgagee clause, the mortgagee is not bound by any of the policy conditions after line 60.

In Massachusetts, the courts, prior to the adoption of the present standard policy, held that in the absence of a subrogation

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provision in the policy, the mortgagee could collect the amount of loss and also retain the mortgage notes, *Kings vs. Ins. Co., Mass. 7 Cushing 1*. This is the only state which has so held. This opinion has been severely criticised and other jurisdictions have ruled that even in the absence of an agreement for subrogation the insurer is entitled to an equitable assignment of the debt from the mortgagee.

The Supreme Judicial Court of Massachusetts has decided that under the standard policy of that state, if the title becomes vested in the mortgagee by foreclosure, the policy is void unless the sale is consented to by the insurer. *Boston Co-operative Bank v. American Central Ins. Co., 87 N. E. 594, 38 Ins. Law Journal, 599*. It has also been held that the mortgagee must file notice and proofs of loss if the owner does not, but he is granted a reasonable time and is not held to such a strict accountability as the insured in the matter of time; *Union Institution for Savings v. Phoenix Ins. Co., 37 Ins. Law Journal 43*.

In Connecticut it has been held that under the short form "loss payable" clause the mortgagee has no right to a voice in the appraisal, while under the mortgagee clause he has. *Collinsville Savings Society v. Boston Insurance Co. 31 Ins. Law Journal, 1031*. This seems to be in direct conflict with the rule in New York as approved in the case of *Hathaway v. Orient Ins. Co., (supra.)*

The words "act or neglect" used in the mortgagee clause have been held to refer to any act or omission on the part of the mortgagor, whether before or after the issue of the rider or policy. On the other hand, it has been held that the clause is effective only as to subsequent acts or neglect of the mortgagor; also that if a condition of the policy has already been violated so as to afford a ground for forfeiture, it cannot be revived by attaching thereto the mortgagee clause unless a new consideration is paid therefor. Misrepresentations of which the mortgagee has knowledge will be attributable to him and he will also be bound by his own misstatements. Generally speaking, the better opinion seems to be that no act or neglect of the mortgagor unknown to the mortgagee, whether prior or subsequent to the date of the contract will avoid it as to his interest. The latest decision on this point is that of *Reed, et al. v. Firemen's Insurance Co., of New Jersey, 40 Ins. Law Journal, 1711, 81 N. J. L. 523, 89 Atl. 462*.

The mortgagee clause gives the mortgagee the right to commence foreclosure proceedings but makes it incumbent upon him

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to notify the company of any change in the title or ownership of the property which shall come to his knowledge. It has been held in at least four states (Kansas, Minnesota, Iowa and Rhode Island) that this has reference to a change or transfer of title to a third person and not to one from the mortgagor to the mortgagee by foreclosure. The argument is that the insurer must have known when attaching the clause that it might be necessary for the mortgagee, in order to protect his interest under the mortgage, to commence foreclosure proceedings; that this would not have a tendency to diminish the interest of the mortgagee in the property, but rather to increase it, and it has been held that an increase in the interest of the insured is no ground for forfeiture of the policy. *Pioneer Savings & Loan Co. v. St. Paul F. & M. Ins. Co.* Minn. S. C. 26 Ins. Law Journal 826, 68 Minn. 170; *Lancashire Ins. Co. v. Boardman* 58 Kan. 339, 27 Ins. Law Journal 1898; *Bailey v. American Central Ins. Co.* (Iowa) C. C. 13 Fed. Rep. 250; *Continental Ins. Co. v. Wood* 50 Kan. 346, 31 Pac. 1079; *Heaton v. Manhattan Fire Ins. Co.* 7 R. I. 502; *Esch v. Home Ins. Co.* 78 Iowa 334, 43 N. W. 229, 16 Am. St. Rep. 443; *Dodge v. Hamburg, Bremen F. Ins. Co.* 4 Kan. App. 415, 46 Pac. 25; *Washburn Mill Co. v. Fire Ass'n.* 60 Minn. 170, 61 N. W. 828, 51 Am. St. Rep. 500.

In the case last cited it was held that the subsequent acquisition of the title to the mortgaged property by the mortgagee will not affect the right of the insurance company to the subrogation as stipulated.

On the other hand, if, at the time of the issue of the policy or the attaching of the mortgagee clause, the mortgagee has knowledge of facts which render the policy void as to the insured, it is void also as to the mortgagee, as he is bound by every consideration of good faith to disclose to the insurer the information he possesses. *Genessee Savings & Loan Ass'n. v. U. S. Fire Ins. Co.*, 16 App. Div. 587 N. Y.

If a mortgagee, after a fire, assigns the mortgage, without transferring any interest in the policy or right of action for the loss caused by fire, there can be no recovery by the assignee of the mortgage. *Kupfersmith v. Delaware Ins. Co.* 80 N. J. L. 191, 84 N. J. L. 271.

If foreclosure proceedings be commenced and before they proceed so far as a judgment, a fire occurs, the mortgagee has a right to proceed with the foreclosure and to a sale of the premises, and the value of the subrogation rights of the insurance company will

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depend upon whether or not anything beyond the mortgage debt is realized through the proceedings. *Eddy v. London Assurance Co.* (Supra.)

An assignment of the mortgage accompanied by an assignment of interest in the policy by the mortgagee will render the mortgagee agreement void and would be without legal support against the insurer unless consented to. *Kase v. Hartford Ins. Co.*, 58 N. J. 34.

A mortgagee, who has sold his mortgage and has either guaranteed payment of the mortgage debt or endorsed the mortgage notes without taking the precaution to add the words "without recourse" has an insurable interest in the property which he should not lose sight of, for if an insurance company pays a loss to the assignee of the mortgage, for which it is not liable to the mortgagor or owner, the company in the exercise of its subrogation rights can call upon the original mortgagee as guarantor or endorser for reimbursement.

It is the prevailing custom in New York City, and possibly elsewhere, to make the following endorsement on policies no matter by whom presented:

The interest of.....mortgagee herein having ceased, loss, if any, is now payable to.....mortgagee. without securing anything whatever in the shape of a release from the original payee. Considering the number of such endorsements which are made each year, it is really remarkable that so little trouble has arisen. There was a decision bearing on this point many years ago, in case of *Reid v. McCrum*, 91 N. Y. 412. Policies on the buildings were endorsed "Loss, if any, payable to John Reid, mortgagee." Subsequently McCrum induced the insurers to cancel the endorsement and write on the policies as follows: "The mortgagee's interest having ceased, the loss, if any, is now payable to Hugh McCrum as owner." The mortgagee's interest had not ceased, and after the buildings were destroyed by fire, the mortgagee brought an action to foreclose his security, making McCrum and the insurers parties defendant. It was quite properly held that the policies could not be legally changed without the assent of the mortgagee and that he was entitled to recover the loss from the insurers.

The question is frequently asked whether any liability accrues to a second mortgagee unless his security has been impaired by the fire, or whether under the mortgagee clause he can collect by rea-

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son of the mere fact that a loss or damage by fire has occurred to the property described in the policy; in short whether it is loss to the second mortgagee's interest or loss to the property itself that determines the liability of the insurer.

It has been uniformly held that a first mortgagee, under the mortgagee clause can collect the amount of loss to the property not exceeding his interest, notwithstanding the fact that the value remaining may be many times the amount of the mortgage debt and even though it is self evident that the first mortgagee has not and will not sustain any loss by reason of the fire. But the fact remains that his security is actually *reduced* and consequently *impaired* to the extent of the amount of loss by fire. He can therefore demand payment from his insurer, who will in turn be subrogated to the extent of the amount paid, provided the policy is void as to the mortgagor or owner.

The foregoing reasoning appears to be perfectly logical as respects the interest of a first mortgagee, but the situation is not so clear in connection with the interest of a second mortgagee, for under certain conditions the security of the latter may not be at all impaired by the fire. Can he in such circumstances collect from his insurer? In answer to this question two diametrically opposite opinions have been expressed. One authority theorizes as follows, to wit:

If a second mortgagee has a separate policy protecting his interest, he has a right to look to it for indemnity. Whether or not he sustains a loss depends upon conditions. There are circumstances under which a second mortgagee's interest may not be affected by a fire, and, if not, he cannot collect anything under a policy made payable to him. For instance, if property should be sold and the new owner should take out a new policy with loss, if any, payable to the first mortgagee under a mortgagee clause, and the second mortgagee should hold a policy in the name of the former owner, with loss, if any, payable to the second mortgagee, the old policy would be void as respects the new owner. Then if the company which insured the new owner should pay the full amount of the loss to the first mortgagee, the interest of the second mortgagee would not be affected, because the amount of the first mortgage would have been reduced to the same extent that the property had been damaged, leaving the second mortgagee's interest relatively the same as it was and therefore sustaining no loss by the fire.

If two policies should be issued to the same owner, one payable to the first and the other payable to the second mortgagee, and a valid claim should arise under both, the first mortgagee could demand the full amount of the loss from his own insurer, in which event said insurer would be subrogated to the extent of the amount paid in excess of its pro rata liability to the owner. The first mortgage under these circumstances would be reduced only to the extent of said pro rata liability, and the second mortgagee could collect from his insurer its pro rata proportion of the loss, but no more.

By such a construction the second mortgagee gets all the benefit

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from his insurance that he is entitled to, namely, that his interest shall not suffer by any loss or damage by fire to the property.

Another authority advances the following argument, to wit:

While it is true that policies taken out in favor of mortgagee are in most of the states to be regarded as contracts of indemnity, they provide very explicitly how that indemnity shall be paid. It must be paid either in cash or by a reinstatement of the property itself; that is, in the case of a burned building, by a rebuilding. The insurance company in such cases cannot escape payment by showing that in reality the insured has suffered no actual loss. The insurance contract with the mortgagee is not in substance a guarantee of his debt or a guarantee that his collateral security shall continue of a certain value, but, on the other hand, is to be construed as an insurance on property against fire loss to that property; and if a fire loss to that property occurs, then the insurer must either rebuild the property itself or pay the full amount of the fire loss to the second mortgagee or to any other mortgagee, but not exceeding, of course, the amount of his interest, that is, the amount of his debt. In principle, it matters not at all whether the mortgage is a first or a second mortgage.

An insurance company has no authority to guarantee the payment of a debt. Its power is limited to insuring against such loss or damage as happens by fire to property. In insuring a mortgage interest it does not insure the debt, but the interest of the mortgagee in the property, upon the safety of which depends his security.

There does not appear to be any American decision bearing directly on the interest of a second mortgagee, but there is an English decision which apparently supports the latter view. (*Westminster Fire Offices v. Glasgow Provident Investment Society* (1888) 13 App. Cas., 699). That case had to do with two series of mortgage bondholders, the suit being brought by the second mortgage bondholders. The insurance companies defended on the ground that the entire amount of loss had been paid by the insurers of the first mortgage bondholders. But the English Court of Appeals decided that this was no ground of defense in whole or in part. But there is a dictum from one of the judges to the effect that if the money so paid had been actually employed *to reinstate the premises* then the decision might have been different on the theory that in that event the second mortgagee bondholders would have sustained no loss. This dictum seems to lean to some extent at least toward the first of the foregoing opinions.

If the latter view be the correct one, and if a second mortgagee can collect the amount of his mortgage from the companies insuring his interest irrespective of whether or not his security has been impaired by the fire, it follows that in many instances, especially in times of real estate depression, a fire would be a veritable godsend to the mortgagee, for his hitherto absolutely dead interest would instantaneously assume unexpectedly valuable proportions

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and the insurers would be compelled to pay a loss which had already accrued from causes other than fire.

This possibility directs attention very forcibly to the fact that from the insurer's standpoint, separate policies containing the mortgagee clause should not be issued in favor of a second mortgagee, but when it is desired to protect said interest under a mortgagee clause, the form should read substantially as follows, viz.:

Loss, if any, under this policy shall be first payable to.....
.....first mortgagee, as his interest may appear; after the debt and interest secured by first mortgage shall be fully satisfied, the remaining loss, if any, shall be payable to.....second mortgagee, as his interest may appear, subject to mortgagee clause hereto attached.

Too great care cannot be exercised in seeing that such a clause is properly phrased. Agents sometimes through ignorance issue policies with a mortgagee clause payable to the first mortgagee and with a separate mortgagee clause payable to a second mortgagee, and in view of the fact that the courts have quite uniformly held that the mortgagee clause is in effect a separate and distinct contract with the mortgagee, it can readily be seen that if two separate clauses are attached to a policy the insurer is quite liable to be confronted with independent claims from each of the mortgagees, except in those states where by statute mortgagees can claim only in the order of their priority. There is not to the writer's knowledge any decision bearing on this point but a policy so issued presents great possibilities for trouble in case of loss.

In connection with the "loss payable" or mortgagee clause, an interesting question arises which has received but little attention at the hands either of text writers or the courts, and that is whether the words "as interest may appear" or "as interest shall appear" are descriptive of the interest existing at the time of the issuance of the policy or at the time of the fire. The Supreme Judicial Court of Massachusetts when called upon to decide the question, held that the words referred to the interest of the mortgagee as it existed at the time of the issuance of the policy, thus giving to the words a restricted rather than a comprehensive interpretation. This view has the effect of preserving to the insurance company the subrogation rights which were within its contemplation at the inception of the contract.

In the case of *Attleborough Savings Bank v. Security Ins. Co.*, 168 Mass. 147, the plaintiff, subsequent to the issuance of the policy, had taken a second and third mortgage on the property in

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addition to the one it already had, and contended that it was entitled to collect the amount due on all three mortgages by reason of the unrestricted nature of the phraseology descriptive of its interest, but the court held that the words used contemplated a possible decrease rather than an increase of the extent of the mortgagee's interest. It is no doubt on account of this decision that in Massachusetts the mortgagee clause is so phrased as to include the mortgagee's interest under present and all future mortgages covering the premises.

It would certainly seem that in the absence of an express agreement, the mortgagee should not be permitted to increase his interest at will and as a result possibly render valueless the insurer's subrogation right, but notwithstanding the high authority above referred to which has passed on the question, it is by no means certain that its decision will be followed in other jurisdictions, and it is not at all improbable that other tribunals equally distinguished may rule that in the absence of restrictive words in the mortgagee clause, it is the interest of the mortgagee at the time of the fire that is intended to be covered. If so this would furnish an additional reason for the desire on the part of a junior encumbrancer to safeguard his interest by insurance entirely independent of that existing in favor of the senior mortgagee.

The belief used to be quite general among insurance companies that in event of neglect on the part of the mortgagor or owner to pay any premium due under the policy the mortgagee would be legally liable therefor, but even as to this the courts are divided in their opinions. The Appellate Division of the Supreme Court of New York, Third Department, at the March, 1914, term in the case of *Coykendall v. Blackmer*, (146 N. Y. Supp 631) held that the words "provided that in case the mortgagor or owner shall neglect to pay any premium due under this policy, the mortgagee (or trustee) shall on demand pay the same" is not a covenant but only a condition, and that the only effect of failure on the part of the mortgagee to pay the premium is to deprive him of the special privileges accorded him in the mortgagee agreement, and that he is not liable for the premium. One justice dissented from the principles enunciated but decided against the plaintiff because he had not made the demand on the mortgagee within a reasonable time. This case did not come before the Court of Appeals. On the contrary the highest courts in North Dakota and Kansas have decided that the mortgagee is liable for the premium in case of default on the part of the mortgagor.

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The North Dakota Court said, "The clause provides that no neglect or act of the mortgagor, nor shall the vacancy of the premises invalidate the policy. If defendant's contention is sound, this provision would be nugatory if the mortgagor should pay the premium on time; for it is only in case of the mortgagor's default that the mortgagee can perform this condition of payment, and defendant insists that it is only on performance of such condition by him that he can have any rights under the mortgagee clause. This construction would destroy its effect in many cases. It would often deprive the mortgagee of any benefit from the provision that he should not be prejudiced by any act or neglect of the mortgagor by reason of vacancy, etc., of the premises. The mortgagee clause gave the mortgagee immunity from certain forfeitures resulting under the policy from the mortgagor's acts or omissions, and the mortgagee in terms agreed to pay for this immunity the premium in case of the mortgagor's default. This is the clear import of the agreement." The Kansas Court said "While the word 'provided' ordinarily indicates that a condition follows, there is no magic in the term but the clause is to be construed from the words employed and from the purpose of the parties gathered from the whole instrument." *St. Paul F. & M. Ins. Co. v. Upton*, 2 N. D. 229, 53 Pac. 472; *Boston Safe Deposit & Trust Co. v. Thomas*, 59 Kan. 470, 53 Pac. 472.

The company reserves the right to cancel the policy at any time as provided by its terms, but in such case the policy shall continue in force for the benefit only of the mortgagee for ten days after notice to the mortgagee of such cancellation and shall then cease, and the Company shall have the right on like notice to cancel the mortgagee agreement. It will be noticed that there are two ways of getting rid of liability to the mortgagee, one by cancelling the policy and the other by cancelling the mortgagee agreement. The policy cannot be legally cancelled in less than five days, unless by waiver on part of the insured; hence "ten days after notice to the mortgagee of such cancellation" may mean fifteen days and perhaps more from date of original notice to the insured. But the mortgagee agreement, the vital principal as regards the mortgagee's interest, can be cancelled by ten days' notice, and too much care cannot be taken to see that notices are properly worded. The following is suggested as a legal form of notice to the mortgagee:

We elect to cancel the mortgage agreement attached to and made a part of our Policy No. issued to through our agency at on 19....., covering on at and made pay-

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able to you as mortgagee (or trustee), in event of loss, and hereby give you ten days' notice thereof, as provided by the terms of said mortgagee clause.

Take notice that on the.....day of....., 19...., at twelve o'clock noon, or, if that date is not ten days from the receipt hereof, then at the expiration of ten days from its receipt, the said agreement will terminate and cease to be in force.

Although, except in the seven States previously referred to, a mortgagee under the plain "loss payable" clause cannot collect if the policy is void as to the mortgagor or owner, he being bound by all the policy conditions preceding line 59, all the courts which have passed directly upon the question have held that a policy cannot be cancelled as to the mortgagee, without notice. But the cancellation provision is in line 51, and notwithstanding the seeming inconsistency in holding that the mortgagee is bound by some of the provisions preceding line 56 and not by others, it is quite evident that under the various "loss payable" clauses in current use, the courts are inclined to distinguish between forfeiture and cancellation and to hold that in order to effect legal cancellation as to the mortgagee's interest he must receive notice. A clause could no doubt be prepared which would relieve the insurer of this necessity, but a policy containing such a provision would lose much, if not all, of its value for collateral purposes and be manifestly unfair to the mortgagee. As a matter of prudence notice should be given both to the insured and the payee regardless of whether the cancellation is by the insured or the company.

It has been held in many well considered cases (although there are some views to the contrary) that a covenant by a mortgagor to keep the buildings upon the mortgaged premises covered by insurance for benefit of the mortgagee, and in event of default thereof authorizing the mortgagee to effect such insurance at the expense of the mortgagor, is only a personal covenant of the mortgagor obligatory upon him alone, and is not a covenant that "runs with the land" or which follows the title; and hence does not bind a subsequent grantee of the mortgagor to keep insurance for the benefit of the mortgagee, nor can premiums paid therefor be recovered of such grantee, nor tacked to the mortgage, even though his deed may have been made subject thereto; nor is the record of the mortgage sufficient legal notice to bind either the grantee or subsequent mortgagee. *Dunlop v. Avery*, 89 N. Y. 592; *Reid v. McCrum*, 91 N. Y. 412; *Farmers Loan & Trust Co. v. Penn. Glass Co.*, 186 U. S. 434.

The closing paragraph of the mortgagee clause has reference to subrogation when there is no liability to the mortgagor or owner,

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it being very properly stipulated that no subrogation shall impair the right of the mortgagee (or trustee) to recover the full amount of his claim. This right of subrogation is about the only consideration for the mortgagee agreement and affords the only excuse for such a contract being entered into.

When the policy is in favor of a first mortgagee on property where land values are high, subrogation is a valuable right, but when the policy is in favor of a second or third mortgagee its value approaches and frequently reaches the vanishing point, and it is on this account that some companies decline as a matter of general practice to issue a mortgagee clause in favor of a second or third mortgagee.

The agreement provides that whenever the insurance company shall pay the mortgagee (or trustee) any sum for loss or damage under the policy and shall claim that, as to the mortgagor or owner, no liability therefor existed, the company shall to the extent of such payment, be thereupon legally subrogated to all the rights of the party to whom such payment shall be made, or may at its option, pay to the mortgagee (or trustee) the whole principal due or to grow due on the mortgage and shall thereupon receive a full assignment and transfer of the mortgage and such other securities. This would seem to be about as clear as it is possible for language to make it, and would indicate to the lay mind that the insurer would have a perfect right even arbitrarily to deny liability to the mortgagor and insist upon the mortgagee complying with the conditions of the agreement, and leave the mortgagor to pursue his remedy under the policy in the courts if he so desired; but the courts say that the clause shall not be construed to vest in the insurance company the right to subrogation upon the mere assertion of claim unfounded in fact; that the claim which it may assert must be valid and well founded. The Supreme Court of Canada has held that the insurance company is not justified in paying the mortgagee and claiming subrogation without first contesting its liability to the mortgagor and establishing its immunity from liability to him, and this is practically the position of those courts in this country which have passed on the question. In short, the mortgagee, if he desires, may decline to accept payment of the loss (although he seldom does) and insist upon a decision from the court of last resort as to whether there is a liability to the mortgagor or owner, before he will be compelled to comply with the subrogation provision. The latest decision is that of *O'Neil v. Franklin Fire Ins. Co.* in which the Court of Ap-

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peals of New York affirmed without opinion the decision rendered by the Appellate Division, 159 App. Div. 313, 216 N. Y. 692, 43 Ins. Law Journal 388. See also *Traders Ins. Co. v. Race* 142 Ill., 338, 31 N. E. 392; *Anderson v. Saugeen Mut. F. Ins. Co.* 18 Ont. Rep. 355; *Bull v. North British Canadian Investment Co. & Imperial Fire Ins. Co.* 15 Ont. Rep. 421, affirmed 18 Canadian Supreme Reports, 697 *Loewenstein v. Queen Ins. Co.* (Mo. S. C.) 39 Ins. Law Journal, 877.

To the mind of the present writer the dissenting views which were expressed in some of these cases are much more reasonable, logical and convincing than the prevailing opinions and the following quotation from the dissenting opinion of Justice Kruse in the O'Neil case (*supra*) undoubtedly sets forth the intention of the framers of the mortgagee agreement.

I think the insurance company was entitled to an assignment of the mortgage. As between the mortgagee and the insurance company, it was not necessary for the insurance company to show that it was not liable to the mortgagor and owner upon the policy. The insurance company made that claim and offered to pay the mortgagee the whole principal due or to grow due, with the interest, and demanded an assignment of the mortgage. Whether or not the insurance shall be applied as a payment upon the mortgage is a question between the mortgagor and the insurance company, in which the mortgagee has no interest. I think the mortgagee has no standing to contest that question with the insurance company.

Several years ago the Chancery Court in New Jersey in the case of *Florence E. Palmer v. John A. McFadden, Guardian, and Niagara Fire Insurance Company*, handed down a remarkable decision. The Niagara, whose policy was the only one of three which was payable to the mortgagee under a mortgagee clause without contribution, paid the mortgagee \$3,416.67 and took an assignment of the bond and mortgage, but its pro rata liability to the insured was only \$1,388.16, or \$2,028.51 less than the amount paid. The court ruled that because the mortgagee clause did not contain the contribution provision, and because the insurer admitted *some* liability to the insured, as distinguished from *no* liability, the insured was entitled to have the bond, mortgage and decree of foreclosure surrendered for cancellation. In short, the lower Court virtually handed the insured \$2,028.51, and if the judgment had been affirmed, she would have made just that much clear profit by the fire. The decision, however, was reversed by the Court of Errors and Appeals, 49 Insurance Law Journal 570, 100 Atl. Rep. 225.

In the absence of an agreement, express or implied, or of a clause in the policy making the loss payable to the mortgagee, or of

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an assignment to the mortgagee, the mortgagee has no interest in a policy taken out by the mortgagor upon his own interest, and conversely a mortgagor has no interest in the proceeds of a policy taken out in the name of the mortgagee for the purpose of protecting his interest only.

Where a policy is made payable to a mortgagee "as his interest may appear," there is a conflict of authority as to whether the mortgagee is entitled to the proceeds arising from the destruction of property included in the policy, but not covered by the mortgage. Cooley's Briefs, 3702.

In Massachusetts, Minnesota, Mississippi and North Carolina, by statute, if by an agreement with the insured or by the terms of a policy taken out by a mortgagor, the whole or any part of the loss is to be paid to mortgagees, the company may pay the mortgagees in the order of their priority of claim and that payment shall be, to the extent thereof, payment and satisfaction of the liability of the company. In Maine, by statute, the mortgagee of real estate has a lien upon any policy of insurance against loss by fire procured thereon by the mortgagor, to take effect, if the loss has not been paid, after filing of a written notice with the Company. Cooley's Briefs, 3703-3704.

A senior mortgagee whose mortgage provides for insurance has no lien on the proceeds of a policy which by the terms of the policy is made payable to a junior mortgagee, except to the extent of the excess, if any. *Dunlop v. Avery*, 89, N. Y. 592.

If a mortgagor complies with the mortgage agreement and takes out insurance for the benefit of the mortgagee and the insurance company becomes insolvent, the mortgagee has no lien against insurance taken out by the mortgagor to protect his own interest. *Nordyke & Marmon Co. v. Gery*, 112, Ind. 535, 13 N. E. 683, 2 Am. St. Rep. 219.

The interest of a mortgagee under the mortgage clause or "loss payable" clause takes precedence over that of an assignee or trustee in bankruptcy, an assignee of claim or an attaching creditor. The equitable interest gained by an assignment of a policy as collateral security will prevail over the claim of an unsecured creditor garnisheeing the company. *Wakefield v. Martin*, 3 Mass. 558. The lien of a mortgagee who has been promised insurance, is superior to that of an assignee of the policy after loss who takes with knowledge of the equity of the mortgagee, (*Nichols v. Baxter*, 5, R. I. 491) or whose assignment is supported only by a precedent debt.

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An assignee of a mortgage containing a covenant to insure was held entitled to priority as to a policy taken out by the mortgagor, over an assignee in insolvency of the mortgagee. *Branch v. Milford Sav. Bk.*, 51 Kan. App., 246, 47 Pac. 555. The right of an attaching creditor has also been held subordinate to this lien; *Providence County Bank v. Benson*, 24 Pick (Mass.) 204. But where the claim under the policy has been assigned after a loss to an innocent purchaser for value, it has been held that his equity was superior to that of the mortgagee; *Swearingen v. Hartford Fire Ins. Co.*, 56 S. C. 355; 34 S. E. 449. The lien of an assignee of a mortgage, who has been promised insurance by his assignor, is enforceable as to insurance taken out by his assignor after the purchase by such assignor of the mortgaged property. *Hyde v. Hartford Fire Ins. Co. (Neb.)* 97 N. W. 629. *Cooley's Briefs*, 3706.

It will be freely conceded that those who loan money on real estate are entitled to fire insurance protection unaffected by the acts or neglect of parties other than themselves. The contracts in their favor must necessarily be less restrictive in their terms than those in favor of the property owners, but the propriety of granting indemnity to a mortgagee under a special contract almost entirely free from conditions without some special consideration is, to say the least, a matter of grave doubt, especially as the right of subrogation in many instances may be of no value whatever.

A new mortgagee clause is now being considered by various underwriting organizations, and no doubt will soon be promulgated for use in states where the present standard form is not required by law.

XII

THE INTEREST OF A MORTGAGEE UNDER A POLICY OF FIRE INSURANCE

LEO LEVY, Lawyer

In the discussion of the provision found at lines 56-59 of the Standard Policy we deal with a subject-matter of great interest to the insuring public by reason of the sums representing investments in mortgage loans. Statistics of this class of capital indicate that at least 60 percent of all permanent realty improvements represent borrowings secured by mortgage. Such investments leave with the debtor the control of the property subject to the lien or encumbrance.

It is historically interesting to trace the gradual development of the means taken to indemnify such investments against fire loss. Suffice it to say for the purpose of this chapter that many years ago the mortgagee interest took out its own insurance embraced in a separate and distinct contract with the insurers; thereafter and at an uncertain period the indemnity to the mortgagee began to be furnished in the form of simple loss payable clauses written on the policy and reading to a named mortgagee, or by the attaching of riders in the form of mortgagee clauses.

Mortgages are a serious business to the holder, somewhat more so for the unfortunate debtor; but as to the insurance company writing the business there is not a word that can describe or define it. In fact, the insurance man who might find it necessary in a given instance to declare what rights or remedies his company has would be at a loss where to begin or end, and the lawyer who wants to tell the insurance man what to do finds a labyrinth of legal precedent, text book declarations and practical demonstrations wholly at variance with the language employed in the contract.

In this situation what can be said to clearly lay down the problems arising from the contract forms as viewed in the light of Court decision?

If this chapter serves no other purpose than to point out the dangers to the company I think its usefulness will have been proven even though it does not decisively declare what will hereafter prove to be the law since it must be borne in mind that so long as Courts exist there will arise questions between mortgagor, mortgagee and insurer calling for reversal of that which we now accept or regard as settled.

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There are forty-eight States each having intermediate Courts and Courts of last resort where from time to time definition of the rights of the parties concerned has been attempted. Also, we have the Federal Courts which from time to time have struggled with the problems mentioned. Some of these States by Legislative enactment have made the language of the contracts compulsory, others have in the same way declared the right of mortgagees upon insurance moneys without the formality of contractual privity.

The varying conditions of the statutory forms of policy are shown by a comparison of the Massachusetts, New Hampshire, New York and (for recent example) the California Standard policies. True it is that the New York form is that most commonly used and there we deal with the lines reading:

If with the consent of this company an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such insurance as shall be written upon, attached or appended hereto.

California has expressly omitted these words. It was discovered that they did not mean to the Courts what was plainly intended.

How do these quoted conditions control, agree with or modify the simple loss payable clause so-called or the full mortgagee clause with or without contribution and what has been judicially declared to be the rights and remedies arising from such forms? In attempting to answer this question I shall not discuss the forms of Court procedure both in law and in equity as they are laid down and declared in the different States and Federal Courts. They directly affect the protection and enforcement of the insurers' rights but are too technical in character and scope to be of much assistance except to the practicing lawyer. These differing forms of legal procedure will often be found to be of great, if not controlling, importance in the practical solution of the questions constantly arising, as are, also, the manner and means of effecting cancellation of the contract so as to remove the mortgagee interest and enforce the right of subrogation under any of the forms mentioned.

I shall not refer at length to these subjects of cancellation and subrogation for the reason that during the course of lectures outlined by the Society they will be embodied in papers directly and fully dealing therewith.

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The policy having been written at the instance and upon the credit of the mortgagee the premium liability will, of course, fall upon such interest. However, where the mortgagor-owner has secured the insurance in the first instance the obligation of paying therefor falls upon such owner and the mortgagee will not be liable until after reasonable notice from the company of default by the owner and then only if the mortgagee has retained the policy. Such premium liability will necessarily be limited to the term of the insurance following such retention.

CANCELLATION.

As to the mortgagee protected by the simple loss payable clause, the provisions for cancellation found in the policy undoubtedly apply and the usual and customary method would have to be followed. This is actual notice of cancellation in definite language with the added precaution of a lawful tender of unearned premium even though the premium may have been paid by the mortgagor-insured.

Where cancellation of the policy is sought as to the interest of a mortgagee named in the mortgagee clause attached we have a difficult and complex situation to deal with due to the variance of language found in the policy and in the mortgagee clause. The policy reads five days notice; the clause reserves the right of cancellation upon the policy terms but provides that even though it be cancelled as to the assured it continues in force for the benefit of the mortgagee subject to separate cancellation notice of ten days to be given to the mortgagee. Whether or not this means ten days additional to the five is uncertain because there immediately follows language indicating that five days separate notice shall be given. Evidently the intent was to cancel the entire insurance interests both of the mortgagee and insured upon five days notice to each, or the interest of the insured upon five days notice, and that as to the mortgagee interest cancellation without notice was effectual but the insurance was to cease after an automatic ten days grace had been granted.

Such notice of cancellation to the insured without actual notice to the mortgagee is, undoubtedly, a nullity since the neglect of the insured under the mortgagee clause could not affect such interest. Again there may arise the question as to voluntary surrender for cancellation by either mortgagor or mortgagee and how far the

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other party would be affected thereby. It should be borne in mind that the rights of neither party i. e. mortgagor or mortgagee, can be adversely affected in the absence of notice in fact or ratification or estoppel after such notice.

It might be proper to suggest that in practice, if cancellation is sought, actual notice should be given to all parties *named* and tender of unearned premium should be made to all; and if surrender be attempted by any, notice should be given to all parties of acceptance of such surrender.

SUBROGATION.

The subrogation clause of the mortgagee rider, irrespective of the policy condition, is to be regarded as a controlling element of the indemnity to the mortgagee and since the discussion of the subject of subrogation is limited it should be said that the claim of the right of subrogation is based upon something more substantial than the mere assertion of invalidity of the policy contract as to the insured (see *O'Neil v. Franklin Ins. Co.*, 159 App. Div. 314, which case will hereafter be referred to. That case is most interesting as a clear exposition of the difficulties arising on account of the forms of legal procedure heretofore referred to).

It might be plainly stated that if the mortgagee with knowledge of the facts does anything to deprive the company of its rights of subrogation there is *lost* to the mortgagee the enforcement of the collection of indemnity; however, this does not relieve the insurer of the obligation of giving *seasonable* and *reasonable* demand for subrogation.

THE RIGHT TO INDEMNITY.

Under the clauses considered the right to indemnity implies a real money loss. It has been held that where the premises insured were restored to the condition in which they were before the fire or damage or loss without expense or obligation on the part of any party to the policy, the insurer would not be liable (*Friemansdorf v. Ins. Co.*, 1 Fed. Rep. 68). By way of contrast we find the case of *King v. Ins. Co.*, (Mass. 7 Cushing, 1) to the effect that even though the mortgagee suffers no monetary damage or loss to the security and if in fact there was a damage the company would have to pay.

This brings up for discussion the provisions of the simple loss payable clause and the mortgagee riders:

Loss, if any, payable to....., mortgagee
or the added words
as interest may appear.

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As to the words "as interest may appear" these words in the light of the cases hereinafter discussed, in my opinion, add neither weight nor substance to the effect legally to be given to the simple loss payable clause. For many years it was the settled law of the State of New York that the designation by the simple loss payable clause of an appointee mortgagee to receive money payment gave such mortgagee no right other than being in a receptive mood and that after all matters had been threshed out between the insured and the company (and only if the policy was valid and the company ready to pay) could such mortgagee require payment.

There has recently been decided in New York State the case of *MacDowell v. St. Paul Fire & Marine Ins. Co.*, found in 207 N. Y., p. 482, March, 1913, Term. The Court in effect held that the words

Loss, if any, first payable to John MacDowell, mortgagee, as his interest may appear, *without* any mortgagee clause or rider attached meant that it was the intention of the parties that the plaintiff as mortgagee should have an interest in the insurance superior to that of the owner; and where such owner declined and refused to make proofs of loss that did not deprive MacDowell, the mortgagee, of his right of recovery under the contract. The Court said that the *contention* that the interest of the mortgagee would be defeated by the wilfull failure or neglect of the mortgagor to perform conditions precedent to the contract was not sound and the very object and purpose of the provisions of the contract with respect to the insurance company assenting to the insurance of an interest other than that of the owner and the use of the words "loss payable to a mortgagee, as interest may appear" meant more than the declaration of a mere naked appointee and that the plaintiff-mortgagee had a vested legal interest in the contract and a settlement of the loss made between the mortgagor-owner and the defendant insurance company without the knowledge or consent of the mortgagee would not have been a bar to a recovery by the mortgagee and the latter was a necessary party to the action brought by the mortgagor.

The opinion of Mr. Justice Miller in this case reviews most, if not all, of the recent cases in New York State construing the lines 56 to 59 of the policy and the Court decided that the construction of the contract contended for (that is, that the payee-mortgagee was merely a designated appointee-payee of a sum to be ascertained under all of the conditions of the policy) defeats the purpose in-

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tended by lines 56 to 59 and that the arbitrary refusal of the owner to make proofs of loss could not affect or destroy the interest of a mortgagee. The Court said that it was unreasonable after a loss had occurred that the interest of the mortgagee designated in the manner indicated to receive payment should be subject to the caprice of the owner and that was equally true whether there was a mortgagee clause or merely the endorsement quoted and that there were two constructions which were possible; the first, that the mortgagee designated merely by loss payable clause was the insured and hence *required to make proofs of loss*; or, secondly, that every mortgagee, however described, whether by merely the simple loss payable clause or the full mortgagee clause, was not an insured and that the word "insured" used in the contract applied *only* to the owner, the one to whom the policy was issued; and that the latter construction did not do violence to any language of the contract but tended rather to give *some* effect to all of its provisions and at the same time to carry out its primary purpose. (The Court was unanimous in its decision).

We next come to the questions arising under the policies having attached thereto the full Standard Mortgage Clause *without contribution*:

The interest of the mortgagee shall not be invalidated by any act or neglect of the mortgagor or owner nor by foreclosure or other proceedings nor by change in the title or ownership nor by occupation of the premises for purpose more hazardous than are permitted by the policy, and provided that in case the mortgagor or owner shall neglect to pay the premium the mortgagee on demand shall pay the same, provided, also, that any change of ownership, occupancy or increase of hazard coming to the knowledge of the mortgagee, trustee, etc., shall be notified to the company and unless permitted by the policy it shall be noted thereon and the mortgagee on demand shall pay the premium for such increased hazard for the term of the use thereof.

As far back as the year 1878 in the well known case of *Hastings v. Westchester Fire Ins. Co.*, 73 N. Y., the settled and declared policy of the Courts of the State of New York was to the effect that the attaching of the mortgagee clause to the policy insuring a designated mortgagee, trustee or third party having an insurable interest, was the creation of a separate contract of insurance by which the interest of the party named in the mortgagee clause would remain unaffected by any act of the owner-mortgagor or insured, and that the separate contract rights thus established were to be determined within the corners of the mortgagee clause. The lines 56-59 of the Standard Form policy although adopted in 1886 were not called up for judicial construction in this State until the decision of the Court

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of Appeals in the case of Heilbrunn v. German Alliance Ins. Co., which I shall designate as the first Heilbrunn case or Heilbrunn No. 1 (year 1911, 140 App. Div., 557, aff'd 202 N. Y., 610). In that case the Court of Appeals unanimously held that the Standard Policy having attached to it a mortgagee clause in the form authorized by law, in so far as the interest of the mortgagee was concerned, stopped with the period mark after line 59 and that all of the conditions which I might term "conditions precedent" required to be performed of an assured after a loss had no application to such mortgagee interest, not even including the short Statute of Limitations, to wit: twelve months, but that a mortgagee having a mortgage interest at the time of the loss which interest *continued* could wait the full period of six years without doing anything at all in the meantime except sleep on the rights given by the mortgagee clause and then serve the summons and complaint demanding payment of the loss; that no matter what happened between that time, to wit: the day of the fire and the bringing of the action, the right of the mortgagee was in no wise impaired or harmed. This was an eye-opener although decisions to the same effect and to the contrary had been rendered by the Courts of other States. It means as I interpret the Court's declaration, that no matter what happens as between the company and the owner after a loss, unless the mortgagee interest was a direct party thereto and chargeable as a matter of *fact* with notice, the mortgagee interest remains unaffected. Of course, this carried away the supposed necessity on the part of the mortgagee of giving notice of loss, making proofs of loss, submitting to appraisal, ascertainment of loss, furnishing any documentary proof or doing any of the things which we lawyers call "conditions precedent." The remedy, the Court said in its most illuminating utterance, lay in application to the Legislature for change in form of the policy and that the word "hereinbefore" found in lines 56 to 59 meant that the conditions before that numerical definition were the only ones binding upon the mortgagee interest.

It cannot be gainsaid or disputed that the law is that if at the inception of the contract, whether of policy or mortgagee clause, the mortgagee has knowledge of facts which render void as to the insured the entire policy, the interest of the mortgagee is directly and adversely affected thereby. This has been declared in a case never overruled or modified either by inference or direct reference, known as the case of the Genessee Saving & Loan Assn. v. U. S. Fire Ins. Co., 16 App. Div. 587. In that case the policy condition

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with respect to sole and unconditional ownership had been violated at the inception of the contract by the fact that the assured and his wife were the owners by the entirety of the property although the policy read to the husband as sole and unconditional owner, and the Court said that the plaintiff Building & Loan Association named as mortgagee under full mortgagee clause

must have known when they took the mortgage that M., the insured, was not the sole and unconditional owner of the property described in the policy, and yet with this knowledge they failed to notify the insurance company of the real condition of the title or to take any measures for the correction of the policy in respect thereto. Inasmuch as the insurance was for the exclusive benefit of the plaintiff Loan Association whose officers appeared to have assumed direction and control of the matter, it would seem that if the plaintiff was to be furnished any indemnity thereby its officers were bound by every consideration of good faith to disclose to the insurance company defendant information they possessed respecting the mortgagor's title. This they omitted to do and such omission made the act or neglect complained of that of the plaintiff mortgagee instead of the mortgagor.

Also if the company can show that the mortgagee had knowledge of increase of hazard and did not communicate such knowledge to the company recovery can not be had by the mortgagee.

This brings us to consider the clauses with respect to contribution. The contribution clause of the Standard New York policy reads as follows:

This company shall not be liable under this policy for greater proportion of any loss on the described property * * * than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application of the insurance under this policy or of the contribution to be made by this company in case of loss, may be provided for by agreement or condition written hereon or attached or appended hereto. (Lines 96 to 101.)

The mortgagee rider has the following language:

In case of any other insurance upon the within described property this company shall not be liable under this policy for a greater proportion of any loss or damage sustained than the sum hereby insured bears to the whole amount of insurance on said property, issued to or held by any party or parties having an insurable interest therein, whether as owner, mortgagee or otherwise.

We find a direct conflict of law on the construction to be placed upon this language in the mortgagee clause and the effect of the language in the policy as applied to mortgagees.

In the well known cases of *Hartford Fire Ins. Co. v. Williams*, Vol. 63 of the Federal Reporter, page 925 (U. S. Circuit Court of Appeals) and *Eddy v. London Assurance Co.*, 143 N. Y., page 311 (New York Court of Appeals) such conflict is found, the United States Court deciding that the words of the contribution clause in the mortgagee rider meant exactly what they said. The lower Court

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first held that the contribution clause was not effective and could not defeat a full recovery against the Hartford Fire Ins. Co. This the Appellate Court declared was unsound, saying:

We can conceive of no other object that the parties could have had in using the words "issued to or held by any party or parties having insurable interest therein" unless it was to avoid the very construction of the clause which the Circuit Court appears to have adopted. As before remarked, the concluding words of the paragraphs seem to have been added out of abundant caution that there might be no ground upon which to insist that the right to pro rata was limited to policies held by the mortgagee or for his benefit * * *. In construing a contract like the one now in hand it is our duty to look to all the provisions of the agreement and to give effect to what seems to have been the obvious intent and meaning of the parties. We would not be justified in ignoring an agreement in one part of the instrument which is as clearly expressed as language could well express it merely because it limits to some extent the scope of general language employed in another part of the instrument.

The Court decreed that the plaintiff in error, the insurance company, was entitled to have a construction of the contribution clause which limited its contribution to the loss to the company's pro rata sum apportioned amongst all the insurance.

To the contrary was the New York decision.

The Eddy decision was handed down by the State Court of Appeals almost simultaneously with that of the U. S. Court in the Williams case and it may be of interest to read from the decision of Mr. Justice Peckham, concurred in by the rest of the bench:

By taking the insurance in the manner the mortgagee herein did, instead of taking out a separate policy, all the provisions in the policy, which from their nature would properly apply to the case of an insurance of the mortgagee's interest, would be regarded as forming part of the contract with him, while those provisions which antagonize or impair the force of the particular and specific provisions contained in the clause providing for the insurance of the mortgagee, must be regarded as ineffective and inapplicable to the case of the mortgagee. So when the agreement in regard to contribution, contained in the body of the policy issued to the owner, is compared with the specific statement in the mortgage clause, that his insurance shall not be invalidated by any act or neglect of the owner, we can only give the latter due force by holding that the insurance of the mortgagee is not, in effect or substance, to be even partially invalidated, i. e., reduced in amount, and to that extent impaired and weakened by any act of the owner unknown to the mortgagee. In such case the general agreement in the body of the policy as to contribution does not, and was not, intended to apply. If it did, then the special and particular contract in the mortgagee clause would be of no effect. If the two are inconsistent, the special contract particularly relating to the mortgagee's insurance, must take precedence over the general language used in the policy issued to the owner. For these reasons the claims of the insurers for a deduction in the amount of their liability cannot be allowed.

* * * * *

* * * We think the true meaning to be extracted from the whole instrument is that the insurance which shall diminish or impair the right of the mortgagee to recover for his loss is one which shall

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have been issued upon his interest in the property, or when he shall have consented to the other insurance upon the owner's interest.

This decision in certain aspects properly comes under the head of "Subrogation"; at the same time it also declares the law of the State to be that since the right to indemnity was dependent upon a money loss actually accruing to the mortgagee, if the mortgagee suffered no such loss because the debt was fully paid and the security discharged, to-wit: the mortgage cancelled, there existed no right against the insurer under the mortgagee clause. In this connection it is also necessary to call to your attention the case of *O'Neil v. Franklin Fire Ins. Co.*, heretofore mentioned as decided by the Supreme Court, Appellate Division of the Fourth Department in November, 1913, Vol. 159 App. Div., p. 314, and there the Court held, after fully discussing all of the old and recent decisions construing the mortgagee clause, that the period of limitation (that is, the twelve months) did not apply. That case is, of course, more on the direct point of subrogation and form of Court procedure than on the other propositions arising under the mortgagee clause, but its effect is to broaden the scope of the first *Heilbrunn* case. (The *O'Neil* case has not yet been decided by the Court of Appeals but will be so decided probably within a month or two).

On the question of the continuation of the interest of the mortgagee as being necessary to sustain an action under the mortgagee clause and the incapacity of the mortgagee's assignee after satisfaction of the mortgage to acquire any right, I call to your attention (in addition to the second *Heilbrunn* case) the decision of the Court of Errors and Appeals of New Jersey in the case entitled *Kupfer-smith v. Delaware Ins. Co.* In that case at the time of the fire there were several policies issued to the assured and to a mortgagee named. After the fire the mortgagee assigned the mortgage and the bond but did not transfer any interest in the policy or right of action for the loss caused by the fire. Thereafter the first assignee of the mortgage assigned the mortgage by mesne assignments to a subsequent or second mortgagee who afterwards secured or attempted to secure from the original mortgagee an assignment of the right of action under the policy. The Court held that the last mentioned assignment of the right of action was made after the original mortgagee had parted with any right, that the right of action *was purely and wholly personal to the original mortgagee* and that the right of recovery under the mortgagee clause was limited to the original mortgagee and that when he assigned the mortgage without assign-

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ing the rights under the policy he parted with his entire interest in the property and in the policy and thereafter had no interest in the property insured or rights under his mortgagee clause. The Court said:

What he was then undertaking to do (that is, after he had parted with the mortgage) was to assign a chose in action when he had nothing to assign, for manifestly he could not have recovered anything from the defendant insurance company after the transfer of his mortgage, even if he had that right before, because he then had no debt or security therefor which he could enforce against the defendant company. The holder of a mortgage protected by a mortgagee clause is not bound to collect from an insurance company the amount of the loss insured against, for the remainder of the property may be a sufficient security for his mortgage. He may call upon the insurer to make him good or he may rely upon the diminished value of the property as a security for his mortgage and when he disposes of his mortgage he has no interest which he may call upon the insurer to make good. He becomes a stranger to the matter without any rights to subsequently assign.

As a rather startling example of the extremes to which the Court will go and do go in protection of a mortgagee or third party interest under a Standard Form of policy and mortgagee riders I call your attention to the following case: in New York State a company issued its policy (with full mortgagee clause attached) insuring the premises therein designated and mortgagee named in the clause; the mortgagee transferred his interest; the insured named transferred his interest; the new owner of the mortgage (that is, the new mortgagee) applied through his agents for a change of notation of interest to be made to him *as the new owner*. The insurance company did exactly as it was requested to do—endorsed the policy continuing the mortgagee clause to the old mortgagee and complied with the request to change the interest of the new mortgagee to that of owner. So far as the records of the company were concerned there had been transfer of interest from one owner to the other; *in fact*, there had been a transfer of interest from one mortgagee to another. The policy was void in fact as to the owner. The mortgagee received the policy in its endorsed form from his own agents accompanied by a letter calling his attention to the fact that he was named *as owner* in the policy and that the company had done exactly as it had been directed to do by the mortgagee and his agents and for over two years he never looked at the policy; about a year after the notation of change of interest the premises were damaged by fire. In an action brought for reformation *three years* thereafter the Court decreed that the reformation should be had by changing the interest from the insured named as owner to that of mortgagee, *with no greater equity as the foundation for such*

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decree than the mortgagee's own negligence. Up to the present time the number of Judges who have written opinions is evenly divided. The case very shortly will come up for decision in the Court of Appeals but the finding is directly contrary to that in the case of *Gillett v. Liverpool & London & Globe Ins. Co.*, in the 73 Wis. Reports, page 203, and to all of the cases bearing upon the remedy of reformation. If held good law by the Court of Appeals its effect will be to take from the companies the right of selecting the *person* who shall be covered by the mortgagee clause.*

It may be stated that the Courts in view of the lack of control over the subject-matter of insurance will afford to the mortgagee interest every possible manner of protection so long as that interest exists and the companies should not be too critical of their judicial utterances in that respect as it must be borne in mind that security holders in all instances in good faith rely fully upon the promise of indemnity found in the contract, having neither possession nor ownership of the property which is subject to their lien and the subject-matter of the risk, and that the fact that there is potentiality for fraud, collusion and evil practice under the mortgagee clause does not alone require a narrow construction of the rights of the third parties under the provisions of the Standard policy and mortgagee clause.

In conclusion I might repeat what has been so forcibly said by an able and eminent authority upon insurance:

If there are any rights or advantages which the mortgagee does not possess, it is either because he has not yet discovered them or has not gone after them, and more remarkable still is the fact that for all this the mortgagee pays nothing whatever. He gets without money and without price a contract which the mortgagor or owner of the best risk in the land cannot buy at any price.

**Salomon v. Ins. Co.*, 215 N. Y. 241. Court of Appeals dismissed the action for reformation as without equity.

XIII

ABANDONMENT, PROTECTION AND REMOVAL.

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ABANDONMENT.

The subject of abandonment has logically no real association with those of protection and removal. The provision of the Standard Policy relating to abandonment is found in lines 4 to 6 and reads as follows: "It shall be optional, however, with this company to take all, or any part, of the articles, at such ascertained or appraised value, and also to repair, rebuild or replace the property lost or damaged with other of like kind and quality within a reasonable time, on giving notice within thirty days after the receipt of the proof herein required of its intention so to do; *but there can be no abandonment to this company of the property described!* The meaning of these words "there can be no abandonment to this company of the property described," is simply that the policyholder has no right at his option to transfer to the insurer the property affected by the fire, and be indemnified as for a total loss. But why was it necessary or desirable to provide against the exercise by the policyholder of any such option? The answer is in part historical.

In the course of the development of the law of marine insurance there eventually sprung up what was and is known as the doctrine of technical or constructive total loss. An insurance against the perils of the sea as in case of an insurance against fire is a contract of indemnity only. Owing, however, to the peculiar nature of the marine adventure the difficulties attending the equitable adjustment of a marine loss have always exceeded those of an adjustment of a loss by fire. In early times such difficulties were immeasurably greater than at the present time. In order to reduce these difficulties it became customary to insert in policies of marine insurance stipulations providing that in certain specified contingencies the policyholder, instead of necessarily assuming the burden of proving the particular amount of a partial loss, might, by a notice to the underwriters that he abandoned to them all his interest in the adventure, recover as for total loss.⁽¹⁾ These customary stipulations in marine policies in time were crystallized into rules of law. For

(1) Emerigon Insurance Chapter, 17, Sec. 1. Blackburn, J., in Rankin v. Potter, L. R. 6 H. L. 83, 125. Brett L. J., in Castellain v. Preston, L. R. 11 Q. B. D. 380, 387. Kaltenbach v. Mackenzie, 3 C. P. D. 467.

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instance, in a celebrated French code of marine laws⁽²⁾ it was provided that "abandonment may be made only in case of capture, shipwreck, breaking up, stranding, arrest of princes or total loss of the effects insured." Under this enactment the doctrines of constructive total loss and abandonment were developed to an extraordinary extent. It was established that upon the happening of any of the events specified in the provision of the French code just quoted, the policyholder, by giving notice of abandonment, might recover for a total loss though the thing insured was quite safe and uninjured. This rule was justified or at least accounted for by saying that the statute created a presumption that where any of the cases just mentioned had happened, the thing was lost. This presumption was carried so far that where a ship was stranded but got off without injury either to herself or cargo, the owners of the *cargo* were permitted to give notice of abandonment and recover as for a total loss. This highly artificial conclusion remained in the French law for nearly one hundred years.⁽³⁾

The English law hesitated to encourage or extend the application of such a doctrine,⁽⁴⁾ one great English judge speaking of it as "a desperate risk cast on the underwriter, who is to save himself as well as he can."⁽⁵⁾ And eventually in England it was decided that the proper principle was that "if a prudent man not insured would decline any further expense in prosecuting an adventure, the termination of which will probably never be successfully accomplished, a party insured may, for his own benefit, as well as that of the underwriter, treat the case as one of a total loss and demand the full sum insured."⁽⁶⁾ In this country the law has been more specific, the rule being that a damage exceeding fifty percent justifies abandonment to the insurer and recovery as for a total loss.⁽⁷⁾

There always was and probably still is room for debate about the wisdom of the doctrine of constructive total loss in marine insurance. Those who argued in favor of its application said that without it the insurance would not afford fair indemnity and that an intolerable burden of proving the amount of the partial loss would be cast upon the policyholder; while those who hold the other way said that it led to a result other than indemnity and tended to

(2) Ordonnance de la Marine of 1681.

(3) Emerigon Chapt. 17, Sec. 2. Blackburn, J., in Rankin v. Potter, L. R. 6 H. L. 83, 126.

(4) See opinions Lord Mansfield in Goss v. Withers, 2 Burr. 683; Buller, J., in Mitchell v. Edie, 1 Term Rep. 608; Lord Ellenborough in Bainbridge v. Neilson, 10 East 329.

(5) Lord Ellenborough in Bainbridge v. Neilson, 10 East 329.

(6) Roux v. Salvador, 3 Bing. N. C. 266.

(7) Washburn & Moen Mfg. Co. v. Reliance Marine Ins. Co., 179 U. S. 1 Orient Ins. Co. v. Adams, 123 U. S. 67. Marcadier v. Chesapeake Ins. Co., 8 Cranch 39.

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encourage fraud. Probably the first mentioned were formerly right, but with modern means of intelligence and transportation the latter would seem to have the better of the argument, and in any event if the insurer knows just what the risk is he can require an adequate compensation for the hazard which is assumed.

In connection with fire insurance the principle of abandonment was never part of the law, and the provision in the standard policy denying to the policyholder the right of abandonment, is declaratory only of what the law would have been without it.⁽⁸⁾ This is equally true in view of the prior provision giving to the insurer the option of taking all or any part of the damaged goods at their appraised value. Such an option in the insurer is utterly inconsistent with an option to abandon in the policyholder. The provision concerning abandonment was inserted, I take it, for other and very important reasons. In the first place it was and is necessary to bring home to the policyholder, especially at the time of a loss, that the contract is one of indemnity only, that by no combination of circumstances could he make a profit or, as the result of a fire, in substance effect a sale to the insurer of any part of the property covered by the policy. Policyholders have been heard of who felt that their destroyed or damaged property was worth the full amount of the policy; that even upon the happening of an accidental fire they should not simply come out whole but should have something over to cover, besides inconvenience, some return for the premiums they have paid in past years when they have had no fire. And, furthermore, times have been known when the policyholder was entirely willing to transfer to the insurer, even at fair market prices, the insured property and so leave the policyholder free to invest the proceeds in other fields of activity. You will note that this provision as to abandonment is contained in the same sentence giving the insurer the options to become the owner at the appraised value of such of the goods as may be left by the fire or to repair, rebuild or replace the property affected by the fire. The insurer does not want the goods, it is not in that line of business; neither is it a general repairer, rebuild or merchandiser of property. What the insurer must have are reasonable checks by which to meet an exaggerated claim of loss and to avoid becoming an involuntary purchaser of more or less desirable property. And so we find this prohibition as to abandonment placed in this sentence composed

(8) Rankin v. Potter, L. R. 6 H. L. 83. Castellain v. Preston, L. R. 11 Q. B. D. 380, 403. Kaltenbach v. Mackenzie, 3 C. P. D. 467, 471. Detroit v. Grummond, 121 Fed. Rep. 963, 971. Hoffman v. Western Marine & Fire Ins. Co., 1 La. Ann. 216.

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of what I may call cross checks upon measurement of damage, and the whole placed within the first six numbered lines of the policy all of which relate to the measure of the policyholder's damage.

In addition to emphasizing the principle that the policy contract is one of indemnity only and of providing an additional check by which to discourage improper claims, there was an additional reason for inserting in the policy this provision as to abandonment. The gentlemen who framed this Standard Policy deemed it to be their duty, not only to insert in the policy the necessary contractual stipulations, but to state in plain words what the *law* was; to codify, as it were, the law so that the policyholder could read it in the contract which he bought. Those gentlemen undoubtedly knew, as does every fire insurance adjuster now, that there can be no abandonment, but without these words the policyholder would not necessarily know it until he had consulted his lawyer after the fire.

My friends who are adjusting losses tell me that this provision as to abandonment serves a very useful purpose, that it makes agreement with the policyholder more possible, and in any proposed new form of Standard Policy these words would undoubtedly remain as they are.

But the practical and real abandonment—to use the word in a non-technical sense—with which the insurer has to deal, is the failure of the policyholder to protect the property during and after a fire.

PROTECTION OF PROPERTY AT AND AFTER FIRE.

Passing from the subject of abandonment to that of protection of the insured property at and after the fire, we find the provisions of the policy upon this point contained in two portions of the policy. The first provision is contained in that portion of the policy relating to hazards which the policy does not cover, lines 31 to 34; the provisions being as follows:

This Company shall not be liable for loss caused directly or indirectly.....by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire or when the property is endangered by fire.

The second provision on this point is found in that portion of the policy relating to the insured's duty in case of loss, lines 67 to 58 where it is provided that "if a fire occur the insured shall..... protect the property from further damage."

These provisions state only what the law would imply in the absence of any such provision in the policy.⁽⁹⁾ They were un-

(9) *Thornton v. Security Ins. Co.*, 117 Fed. Rep. 773. *Phoenix Ins. Co. v. Mills*, 77 Ill. App. 546.

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doubtedly inserted for the same reason that the provision as to abandonment was inserted, namely, as informing the policyholder of the existing law; the theory of the law being that the damage occasioned by the failure of the policyholder to protect his goods was not caused proximately by the fire but by the policyholder's own want of care.

If, therefore, the policyholder is under a duty to protect his property, the question naturally arises as to the standard of care which he must take. The standard of care in the nature of things cannot be definitely fixed either by explicit provisions of law or by contractual stipulations, as each case must depend upon its peculiar circumstances. However, it may be said generally that the policyholder is under a duty to exercise what the law calls reasonable care, that is such a degree of care, caution and effort which might reasonably be expected of an ordinary prudent person under like circumstances and conditions.⁽¹⁰⁾ The duty is that of the policyholder and may not be delegated; for instance, suppose a policyholder had with all due care hired what he regarded as competent watchmen to look after his property and those watchmen were guilty of negligence or lack of care in protecting the property at the time of the fire. Has the assured discharged his full duty in the premises? It would seem not. The policyholder is precisely as responsible for the lack of care of his servants in protecting the property at the time of the fire as an individual is for the lack of care of his servants or agents in the conduct of his business in other respects. The insured, therefore, may not delegate to others his duty to exercise reasonable care in the protection of his property at the time of or after the fire.

The duty of the policyholder is an active duty and not simply a passive one. He may not sit still and smoke his pipe and allow the fire to burn. This duty to protect includes the duty to remove when such removal is necessary to protection. Obviously he may not interfere with the efforts of others to extinguish the fire or to save his property.⁽¹¹⁾ His duty, however, to take reasonable care to protect his property is secondary to his duty of caring for the members of his family or to save life and, if the latter duties prevent attention to the former, the policyholder is not chargeable with neglect.⁽¹²⁾

(10) *Price v. Patrons' Home Protection Co.*, 77 Mo. App. 236.

(11) *Phoenix Ins. Co. v. Mills*, 77 Ill. App. 546. *Devlin v. Queen Ins. Co.*, 46 U. C. O. B. 611.

(12) *Raymond v. Farmers Ins. Co.*, 114 Mich. 386. *Citizen's Ins. Co. v. Bland*, 39 S. W. Rep. 825.

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After the fire he must take the requisite steps to prevent the further deterioration of the property⁽¹³⁾ but this duty does not go to the extent of requiring him to repair or to restore the property to its original condition before the fire.⁽¹⁴⁾

The burden of proving a failure of duty on the part of the policyholder in protecting his property is upon the insurer⁽¹⁵⁾ and is in most cases a question for the jury who are the judges of what the standard of reasonable care under the circumstances would be.⁽¹⁶⁾

When the policyholder in the exercise of reasonable care to save and preserve his property, whether at or after the fire, has incurred expense or additional loss, the insurer is liable up to the amount of the policy for all such expenses reasonably incurred or losses unavoidably sustained, which provision, it will be seen, may operate in certain cases to increase rather than to diminish the damages payable by the insurer.⁽¹⁷⁾

In the event of the failure of the policyholder to perform his duty to protect the property, the question naturally arises whether the consequences of such failure relate merely to the measure of damages to be recovered or whether, in certain cases, such failure may operate to avoid the policy entirely. Clearly by the express stipulation of the parties as well as by the law the policyholder cannot recover for such portion of the loss as was due to his failure of duty in caring for the property insured at or after the fire. If the stipulation contained in lines 31 to 34 were the only provision in the policy, the only result of such failure of duty would be that the consequences of such failure would relate merely to the measure of damages.⁽¹⁸⁾ The stipulation, however, in lines 67 to 68 goes further than to limit the liability of the company. It imposes a direct obligation upon the assured to protect the property from further damage as well as to separate the damaged and undamaged property and put it in order. This requirement is made rigid by the subsequent provision in lines 106 and 107 that "no suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance

(13) *Boak Fish Co. v. Manchester Fire Assur. Co.*, 84 Minn. 419. *Alter v. Home Ins. Co.*, 50 La. Ann. 1316. *Liak v. Citizen's Ins. Co.*, 16 Ind. App. 565.

(14) *Hoffman v. Aetna Fire Ins. Co.*, 1 Robt. 501.

(15) *Fletcher v. German American Ins. Co.*, 79 Minn. 337. *Aurora Fire Ins. Co. v. Johnson*, 46 Ind. 315.

(17) *White v. Republic & Relief Ins. Cos.*, 57 Me. 91. *Case v. Hartford Ins. Co.*, 13 Ill. 676. *Stanley v. Western Ins. Co.*, L. R. 3 Ex. 71, 74. *Thompson v. Montreal Ins. Co.*, 6 U. C. Q. B. 319. *McPherson v. Guardian Ins. Co.*, Newf. L. R. (1884-96) 768.

(18) *Wolters v. Assurance Co.*, 95 Wis. 265. *Thornton v. Security Ins. Co.*, 117 Fed. Rep. 773.

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by the insured with all the foregoing requirements." Under this provision it has been held that a failure on the part of the policyholder to separate the damaged from the undamaged property and to put it in the best possible order works a forfeiture of the policy and is a complete defense to an action for the recovery of any amount thereunder. ⁽¹⁹⁾ Likewise it has been held that where there is a *wilful* failure to protect the property from further damage the assured can recover nothing under the policy.⁽²⁰⁾ But whether the courts would go so far as to say that simple neglect to use reasonable care to protect without fraud or wilful default would avoid the policy may be seriously doubted. In all probability the courts would not so decide.

The question has been asked, if after the fire, in order to prevent further deterioration, the insurer can compel the policyholder to remove the goods from the burned premises to premises indicated by the insurer, such as those of a salvage association, for the purpose of preservation and separation, provided the insurer offers to pay all expenses of such salvage operation, the goods meanwhile to remain the property of the policyholder? I venture the suggestion that what the insurer can do is to notify the policyholder that the insurer, without cost to the policyholder, is willing to forthwith remove the goods to a proper place and separate and preserve them; that if the policyholder declines to permit this and fails to immediately remove the goods to some other appropriate place and separate and preserve them, then the insurer will not only decline responsibility for the further damage so caused but will consider such refusal as a ground for forfeiture of the policy. A court and jury, in my opinion, would, be biased against any policyholder who should so refuse; such refusal would come very near to wilful failure to protect; and a case or two of this kind, properly substantiated and contested, would cause a change in any occasional attitude in this respect.

REMOVAL.

And finally we come to the subject of removal and the liability of the insurer with reference to the removal of property endangered by fire. This subject may well be divided into two parts; first, the liability of the company for the expense of removal and for losses occasioned thereby and, second, the future liability of the company for losses arising in the new location.

(19) *Thornton v. Security Ins. Co.*, 117 Fed. Rep. 773. *Oshkosh Match Works v. Manchester Fire Assur. Co.*, 92 Wis. 510.

(20) *Devlin v. Queen Ins. Co.*, 46 U. C. Q. D. 611.

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As to the first of the above subdivisions, there is no express provision of the policy which is directly applicable. The provision in lines 96 and 97 of the policy to the effect that the insurer "shall not be liable under this policy for a greater proportion of * * * loss by and expense of removal from premises endangered by fire, than the amount hereby insured shall bear to the whole insurance" is a provision of limitation, not of extension, and is at most but an implied recognition of the liability imposed by the law upon the insurer to reimburse the policyholder for expenses and losses upon removal. As has been stated before, however, the policyholder is in duty bound to use all reasonable means to save the property at and after a fire and, being under such duty, may charge the insurer for reasonable expenses incurred and losses sustained in the performance of such duty up to the amount of the policy. While the liability of the underwriter in this respect was not established without some dissent, it is now universally recognized.

In applying this principle of additional liability the courts have said that the connection between the fire and the loss or damage occasioned by the removal must be so close that the relation of cause and effect is clearly established. The removal must be fairly and reasonably necessary and not as the result of an unreasonable and unfounded apprehension, as where the fire is at a considerable distance. The imminence of the peril must be apparent and must be such as would prompt a prudent uninsured person to remove the goods from the danger threatening;⁽²¹⁾ from which it follows that where the danger is so immediate that a failure to remove the goods would constitute negligence, the insured is entitled to recover the reasonable expenses and losses attending the removal.⁽²²⁾ Whether the removal was in fact necessary or prudent must be judged, of course, not by the final outcome but by the circumstances as they appeared at the time of the removal.⁽²³⁾

Assuming the circumstances of a particular case to justify a removal, the further question arises as to what are the limits of the insurer's liability for the consequent expenses and losses. Obviously there can be no recovery for losses due to carelessness in handling or to wanton and unnecessary exposure;⁽²⁴⁾ nor can there be a recovery for losses arising from risks expressly excluded by the terms of the Standard Policy. For instance, while the courts have fre-

(21) *White v. Republic Fire Ins. Co.*, 57 Me. 91. *Holtzman v. Franklin Ins. Co.*, 12 Fed. Cas. 6649.

(22) *Case v. Hartford Fire Ins. Co.*, 13 Ill. 676.

(23) *Balestracci v. Firemen's Ins. Co.*, 34 La. Ann. 844. *White v. Republic Fire Ins. Co.*, 57 Me. 91.

(24) *Case v. Hartford Fire Ins. Co.*, 13 Ill. 676, 682.

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quently held under policies other than the standard policy, that a loss by theft arising from the confusion attending removal of the goods insured is a loss proximately caused by the fire for which the insured can recover; nevertheless in view of the present provision in the Standard Policy excluding liability for losses by theft, the insurer is not responsible for losses by theft although directly and immediately due to a necessary removal of the goods.⁽²⁵⁾ The burden of proving that any particular portion of the loss was caused by theft would, of course, be upon the insurer.

The reasonable expenses of removal may, of course, be recovered,⁽²⁶⁾ and likewise loss by breakage⁽²⁷⁾ and that caused by exposure of goods to the weather.⁽²⁸⁾ And this liability for damage caused by the elements as the result of a necessary removal would continue for a reasonable time after the expiration of the policy, but not for damage caused by a new fire after such expiration.

The second subdivision of this subject of removal concerns the future liability of the company for losses arising in the new location. The provision in this respect is unnecessarily a long and cumbersome one and is found in lines 60 to 66 of the policy, which I shall not burden you by quoting as the reader is so familiar with it. The substance and intent of such provision is that the policy covers pro rata for five days at a proper place to which any part of the property is necessarily removed for preservation from fire. But for this provision the policy would not protect the removed goods from loss caused by an admittedly new peril such as a fresh fire arising in the new location. It has been said that the framers of this Standard Policy felt that if a policy-holder moved his goods under a legal duty so to do, the insurance should follow the goods for a time long enough to allow the policyholder to take steps to obtain future insurance, and it is believed that this Standard Fire Policy was the first policy that ever contained this express stipulation. There was, however, a well known precedent in the law of marine insurance where property necessarily transhipped was covered by the policy. The desired protection, however, could be very briefly and simply expressed by inserting after the words at the beginning of the policy referring to "the following described property while located and contained as described herein" such

(25) *Balestracci v. Firemen's Ins. Co.*, 34 La. Ann. 844. *Fernandez v. Merchants Mutual Ins. Co.*, 17 La. Ann. 131. *Webb v. Protectors Ins. Co.*, 14 La. Ann. 426.

(26) *White v. Republic Fire Ins. Co.*, 57 Me. 91. *Talamon v. Home Mutual Ins. Co.*, 16 La. Ann. 426.

(27) *Balestracci v. Firemen's Ins. Co.*, 34 La. Ann. 844. *Stanley v. Western Ins. Co.*, L. R. 3 Ex. 71.

(28) *McPherson v. Guardian Ins. Co.*, Newf. L. R. (1884-96) 768. *Thompson v. Montreal Ins. Co.*, 6 U. C. Q. B. 319.

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words as "or pro rata for five days at a proper place to which any of the property shall necessarily be removed for preservation from fire" as has been suggested.

XIV WHAT IS A FIRE LOSS?

W. N. BAMENT

General Adjuster, The Home Insurance Company

When Prometheus brought to earth as a gift to man the fire he had stolen from the chariot of the sun, he could never, even with his superhuman attributes, have imagined its possibilities of destruction as evidenced by wars and conflagrations, or the magnitude and far reaching effect of its benefits, which have their practical manifestation in the arts and sciences. Nor could he have even dimly pictured as one of the results of his benefaction the great business of fire insurance, which, after an evolutionary process of over two hundred years, is now regarded as the hand-maid of commerce and one of the most important factors in our social, mercantile and industrial life.

It is said that human culture began with the utilization of fire, and that culture increased in the same ratio as its use. The ancients, the barbaric tribes, and even our forefathers were interested in how to produce and preserve it; we are chiefly interested in how to control and prevent it. It was an element in the national and religious ceremonies of the ancient Egyptians, the Greeks, Romans and Persians, and among the aboriginal tribes of America. From the dawn of civilization, and even before, the human race has been more or less familiar with fire and its phenomena, yet the question, "What is a fire?" has claimed the consideration of scientists, lawyers, courts and juries, and possesses enough elements, if not of doubt, yet certainly of interest, to command the studious attention of all those engaged in the business of fire insurance.

To constitute "fire" within the meaning of a policy of fire insurance, two requisites are necessary. First, there must be actual ignition, evidenced by a flame, glow, or something resembling luminosity. Second, the fire must be, so far as the insured is concerned, accidental in its origin. Hence a fire in a stove, grate or furnace, no matter how intense it may become, or the flame of a lamp, oil stove or gas jet, no matter how high it may rise, so long as it is confined to the place where it is intended to be, is not a fire within the meaning of the contract. A fire of this character is denominated "friendly" as distinguished from "hostile," and any

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loss caused by smoke, heat or soot from such fire, or by the burning of property therein, is not covered by the policy.

If, however, such friendly fire extends beyond the place intended and provided for it, and causes ignition outside its proper limits, there is at once an independent fire, fortuitous in its origin, and hostile in its nature, and any loss resulting therefrom, whether by direct burning, smoke or heat, comes within the protection of the policy.

A contract of fire insurance differs from ordinary contracts in that it is based upon an event which is possible or liable, but not certain, to occur. Its very essence is embodied in the words "casualty," "accident," "chance," "contingency." The insurer undertakes, for a comparatively small premium, to guarantee the insured against loss upon the happening of a certain event, and the contract implies the utmost good faith. If, therefore, the insured intentionally sets fire to his property he thereby violates the essential principle of the contract, and even in the absence of a special stipulation, there can be no recovery. And it is not necessary that any indictable offense be shown in order to prevent recovery for the wilful burning of the property.

SCHMIDT v. NEW YORK, etc., INS. CO.,
1 Gray (Mass.) 529.

Recently a man was tried on the charge of having wilfully set fire to his property. The jury disagreed by reason of the fact that the accused on the stand, evidently upon the advice of counsel, made the remarkable statement that he had no motive for burning the property because the premises had been vacant for more than thirty days, and therefore his insurance policy, which was for several thousand dollars, was null and void.

Where, as in some of the older forms, the policy contained a stipulation that the company would be discharged from the payment of loss caused by gross negligence, and it having been proved at the trial of the case that the fire did occur from such cause, the insurer was not held.

CAMPBELL v. MONMOUTH MUT. FIRE INS. CO.,
59 Me. 430; 5 Bennett 395.

The general rule is that carelessness or negligence of the insured, his agents and servants, in the absence of a special stipulation, affords no defense. Aside from the difficulties in the way of determining the degree of negligence which would be sufficient

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to cause forfeiture, negligence is a well known human characteristic, and a different rule would practically defeat the chief purpose of insurance.

WATERS v. MERCHANTS' LOUISVILLE INS. CO.,
11 Pet. (U. S.) 213; 1 Bennett 615.

On the other hand there is good authority in favor of the doctrine that grave misconduct on the part of the insured or his responsible agent of so pronounced a character as to evince a fraudulent purpose, a corrupt design, or a culpable recklessness and indifference to the rights of others, or the omission to do that which good faith requires that he should do, would warrant a verdict excusing the insurer from liability. For instance, if the premises should take fire and the flame begin to kindle in such a small way that a cup of water would put it out, and the insured having water at hand should neglect to use it; or where the insured, in his own house, sees the burning coals in the fire place roll down on his wooden floor, and does not brush them up; or if the insured not only neglects to save the property himself but attempts to prevent others from saving it, the loss has been held to fall upon the insured and not upon the insurer.

THORNTON v. SECURITY INS. CO.,
(C. C.) 117 Fed. 773.

CHANDLER v. WORCESTER MUT. FIRE INS. CO.,
3 Cush. (Mass.) 328.

ELLSWORTH et al. v. AETNA INS. CO.,
89 N. Y. 186.

FLEISCH v. INS. CO. OF N. AM.,
56 Mo. App. 596.

AURORA FIRE INS. CO. v. JOHNSON,
46 Ind. 315-326.

CIN. MUT. INS. CO. v. MAY, .
20 Ohio 211.

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There is quite a conspicuous absence of consistency in the decisions bearing on this question. For example, the insured, the owner of a steamboat, while racing with another boat placed a barrel of turpentine near the opening in the furnace, intending to use it for fuel, and as a consequence the steamer was destroyed by fire. His conduct was not wilful, yet the Court held that there could be no recovery. (Citizens Ins. Co. v. Marsh, 41 Pa. St. 386.) On the other hand, where an ice house was destroyed by the spread of a fire which had been made by the president of the plaintiff corporation, not far from the building, for the purpose of burning some rubbish, and which had been left burning without any one to watch it during the noon hour, the insurer was held liable.

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DES MOINES ICE CO. v. NIAGARA FIRE INS. CO.,
99 Iowa 193; 68 N. W. 600.

Every insurance company has numerous instances each year where negligence is quite as pronounced as in either of the above cases, and no one in these days ever thinks of contesting them. It is probably no exaggeration to say that a majority of all the fire losses which occur are directly chargeable to negligence of some kind on the part of the insured, his agents or servants.

The New York standard policy contains a condition making it incumbent upon the insured to use all reasonable means to save and preserve the property at and after a fire, or when the property is endangered by fire in neighboring premises, although it has been held that such a provision does not impose any additional duty upon the insured because it is clearly his duty to do this without any express provision in the policy. (*Cincinnati Mut. Ins. Co. vs. May* 20 Ohio 211, (*supra*) *Gardere vs. Columbian Ins. Co.* 7 Johns R. 514 (N. Y.) It is, however, the almost universal custom for the insured, his man servants, his maid servants, and everybody else, to lose their heads in the presence of fire, and do those things which they should not do, and leave undone those things which they should do, and although there are a few cases on record of such a flagrant nature that the insurers were excused (*supra*), it is seldom that a case of misfeasance or nonfeasance occurs sufficiently pronounced to induce a jury to exempt the insurers from liability.

If the insured burns his property while insane, his irresponsible act is no bar to recovery. (*Karow vs. Continental Ins. Co.* 57 Wis. 56; 15 N. W. 27; 46 Am. Rep. 17). The act of a third party in setting fire to the property whether unintentional, careless or criminal, or that of an agent of the insured while acting outside the scope of his authority, will not relieve the insurer from liability unless the burning was with the privity or consent of the insured. Likewise, the intentional burning of the property of the husband by the wife, or that of the wife by the husband, or that of the father by the son will afford no defense to the insurer.

WALKER v. PHOENIX INS. CO.,
62 Mo. App. 209.

MICKEY v. BURLINGTON INS. CO.,
35 Ia. 174.

GOVE v. INS. CO.,
48 N. H. 41.

PERRY v. MECHANICS INS. CO.,
11 Fed. 485.

PLINSKY v. GERMANIA INS. CO.,
32 Fed. 47.

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FEIBELMAN v. MANCHESTER ASSURANCE CO.
108 Ala. 180.

HENDERSON v. WESTERN INS. CO.,
10 Rob. (La.) 164.

MALIN v. MERCANTILE TOWN MUT. INS. CO.,
105 Mo. App. 625. Richards on Ins.

There is on record a foreign case where a piece of jewelry was accidentally knocked from a mantel piece into the fire below and it was held to be a direct loss by fire. (Paris Law Courts, 22 Irish Laws and Solicitors, Jl. 169). It is submitted that this ruling is unsound. It is true the fall of the jewelry was accidental, and it dropped into a place where it was not intended to be. The fire, however, was not accidental, and remained where it was voluntarily placed. It was a friendly fire performing its duty as such, and it did not become any the less friendly or acquire any of the elements of a hostile fire because a piece of more than ordinarily expensive and less combustible fuel was added to the flames. No independent hostile fire was created, any more than one would be by the throwing into the grate of another piece of wood or shovelful of coal. The fire itself must be accidental in order to bring the loss within the protection of the policy.

Some analogy may be drawn between those cases where jewelry and other articles fall or are inadvertently thrown into a grate or furnace, and the familiar and frequent ones where clothing falls upon a red hot stove, or where a lace curtain blows or is pushed against a gas jet. The analogy is slight and ends with the accident nature of the contact. When the clothing touches the stove, or the curtain the gas jet, another fire is started, entirely independent of that in the stove or the gas burner. The second fire thus created is hostile, and not being confined to the limits within which fire is intended to be, the loss is one for which the insurer is liable.

Where the heat from escaping steam is so great as to cause charring, but without ignition, there is no loss within the meaning of the policy. (Gibbons vs. German Ins. & Sav. Inst. 30 Ill. App. 263). Although certain chemical actions may correspond in their effects to fire, they do not constitute fire unless they result in actual ignition. Mere combustion will not support a claim for loss by fire, unless it is sufficiently rapid to produce ignition. (Western Woolen Mills Co. vs. Northern Assurance Co. 139 Fed. 637; 72 U. S. C. C. A. 1). Although lightning may be a form of fire, loss caused by lightning, without actual ignition, is not in the ordinary

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meaning of the words, a loss by fire; but a "lightning clause" may be, and usually is, attached to the policy.

The ablest and most interesting exposition of the question as to what is meant by "fire" within the meaning of a contract of fire insurance is that contained in the opinion of the United States Circuit Court of Appeals, 8th Circuit, in the case of *Western Woolen Mills Co. vs. Northern Assurance Co.* 139 Fed. Rep. 637, 92 U. S. C. C. A. p. 1 which may be briefly stated as follows: A large quantity of wool in fleeces was submerged for eight days during a flood, which caused spontaneous combustion, with smoke, steam and great heat by which the wool was damaged and its fibre destroyed. The building did not burn, nor did any part of it. The wool was spread to dry and was stirred with pitch forks day and night, as it was too hot for handling, though not hot enough to blister one's hands. The wool was at all times wet, but at no time was there any visible evidence of what is popularly known as fire.

The Court said, "Spontaneous combustion is usually a rapid oxidation. Fire is oxidation which is so rapid as to either produce flame or a glow. Fire is always caused by combustion, but combustion does not always cause fire. The word "spontaneous" refers to the origin of the combustion. It means the internal development of heat without the action of an external agent. Combustion, or spontaneous combustion may be so rapid as to produce fire, but until it does so, combustion cannot be said to be fire."

"No definition of fire can be found that does not include the idea of visible heat or light, and this is also the popular meaning of the word. The slow decomposition of animal and vegetable matter in the air is caused by combustion. Combustion keeps up the animal heat in the body. It causes the wheat to heat in the bin and in the stack. It causes hay in the stack and in the mow of the barn to heat and decompose. It causes the sound tree of the forest, when thrown to the ground, in the course of years to decay and molder away until it becomes again a part of Mother Earth. Still we never speak of these processes as fire. And why? Because the process of oxidation is so slow that it does not produce a flame or glow." Held that the loss was not the result of fire within the meaning of the contract.

The above opinion was rendered by one of the highest courts in the land, after careful study and consideration of the testimony of a large number of scientific experts, yet a Kansas judge, in another case in the State Court growing out of the same fire, had

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such an exalted opinion of the intelligence of a Kansas jury that he deemed it unnecessary to give any definition of what constitutes "fire," and the jury, as was to be expected, proceeded to show its entire ignorance of the subject by rendering the customary insurance verdict, which the divided higher court, in a semi-apologetic opinion, refused to disturb.

WESTERN WOOLEN MILLS CO. v. SUN INSURANCE OFFICE,
72 Kan. 48; 82 Pac. Rep. 513.

In a case where the building was heated by steam, which by the breaking of a pipe escaped into a room, damaging books and furniture and causing such intense heat as to result in charring and otherwise severely damaging the contents of the room, the Illinois Appellate Court said: "Fire and heat are not one, but cause and effect. Damage by heat is not insured against in terms, and is covered by the policy only where the misplaced fire causes it. If fire were a moral agent, no blame could be imputed to it. It was doing its duty, and nothing more. The damage was caused by another agent, who, undertaking to transmit the beneficial influence of the fire, broke down in the task. The common understanding of the word "fire" would never include heat, short of the degree of ignition."

GIBBONS v. GERMAN INS. & SAV. INST.,
30 Ill. App. 263.

Perhaps the most famous and the most frequently quoted decision bearing on this subject is that in the English case of *Austin vs. Drewe*, decided in 1816 (4 Campbell 360; 6 Taunt 436). The property covered was the stock and utensils in a sugar house. The building was eight stories in height, and in each story sugar, in a certain stage of preparation, was deposited for the purpose of being refined; this required a certain degree of heat, and this was communicated to each story by a chimney running up through the whole building and forming almost one side thereof. At the top of the chimney, above the eight stories, was a register, which the plaintiffs used to shut at night in order to retain in the chimney and building all the heat they could. One morning a servant neglected to open the register, and shortly afterward it was discovered that sparks and smoke had gotten into the rooms; that heat had slightly blistered the walls and accidentally discolored and damaged the sugars. There was no fire in the building that ought not to be there; nothing was on fire that ought not to be on fire; the damage was occasioned by sparks, heat and smoke. The jury found for the defendant, and the verdict was sustained on appeal, the Court hold-

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ing that the loss was occasioned by the unskillful management of the machinery and register by the plaintiff's own servants; that it was not caused by fire within the meaning of the policy, and the insurer was not liable.

The smoking lamp figures quite extensively in the experience of every fire insurance adjuster, but all the decisions which have been rendered in cases of this nature are in favor of the insurer. Two cases which may be mentioned as directly in point are *Fitzgerald vs. German Amer. Ins. Co.* (62 N. Y. Supp. 824; 30 N. Y. Misc. 72) and *Samuels vs. Continental Ins. Co.* (2 Pa. Dist. Ct. 397). The former was an ordinary smoking lamp damage, there being no fire outside the lamp itself. In reversing a judgment for the plaintiff the Court said: "The rule seems to be that where the insured employs fire for economic or scientific purposes, and the fire is confined to the agencies so employed, and damage ensues, without any actual ignition to the property insured, the insurance company is not liable." The latter case was an extraordinary smoking lamp damage, the flame having risen two or three feet above the chimney, but it ignited nothing outside the lamp. Held, that the insurer was not liable.

This doctrine is eminently sound, and if it were otherwise, there would be no escape from liability on the part of insurance companies, for the expense of redecorating tens of thousands of ceilings in dwelling houses alone which are blackened or otherwise discolored each year by smoking gas jets, which expense would almost, if not entirely, absorb the modest premiums collected on that class of property.

In Massachusetts, claim was made for damage to walls and furnishings by smoke from burning soot in a chimney. There was no fire except in the stove and in the chimney. The Court seems to have had some difficulty in reaching a conclusion, but finally decided, and rightly, that the blaze in the chimney was a hostile fire independent of the friendly fire in the stove, and that the insurer was liable, using the following language: "A chimney is not intended to be used as a place in which to kindle fires. It is intended to carry off the products of combustion. We are inclined to the opinion that a distinction should be made between a fire intentionally lighted and maintained for a useful purpose in connection with the occupation of a building, and a fire which starts from such a fire without human agency, in a place where fires are never lighted nor maintained, although such ignition may naturally

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be expected to occur as an incident to the maintenance of necessary fires, and although the place where it occurs is constructed with a view to prevent damage from such ignition."

WAY v. ABINGTON MUT. FIRE INS. CO.,
166 Mass. 67; 43 N. E. 1032.

By parity of reasoning, although the insurer would not be liable for loss caused by smoke and soot from a lamp or an oil stove, so long as the flame is confined to the wick, no matter to what height it may extend, yet if it gets outside of the wick and envelops the lamp or stove itself, the insurer would be liable for the ensuing loss, for the reason that the fire then gets outside of the place where it is intentionally lighted, loses its friendly nature, and becomes hostile.

A case bearing directly on this point is that of *Collins vs. Delaware Ins. Co.* (9 Pa. Super. Ct. 576). The damage was caused by fire in an oil stove, and it was left to the jury to determine from the conflicting testimony whether the fire was confined to the wick or spread to the oil reservoir. The verdict was for the plaintiff, the Court having charged the jury that if the loss was due to smoke or heat caused by fire while in its proper place in the stove, the insurer would not be liable, but that if the loss was caused by a fire outside its proper place they should find for the plaintiff.

A case differing in an essential particular from that of *Way vs. Abington Mut. Fire Ins. Co.* (supra), but possessing some points in common, is that of *Cannon v. Phoenix Ins. Co.* (110 Ga. 562). The policy covered on a stock of dry goods, hats and clothing. A stove pipe became disconnected at the ceiling, and when a fire was built in the stove, the smoke and soot damaged the goods in the upper story to the extent of several thousand dollars. Water was used quite freely to cool the ceiling, but there was no evidence that there was any fire except in the stove where it was intended to be. Held, that the insurer was not liable.

The insurer is not liable for damage caused by an exploding steam boiler, where there was no fire except under the boiler; nor for damage to a boiler by overheating from regular furnace fires, owing to the absence of water in the boiler.

MILLANDON v. NEW ORLEANS INS. CO.,
4 La. Ann. 15.

AMERICAN TOWING CO. v. GERMAN FIRE INS. CO.,
74 Md. 25; 21 Atl. 553.

Recently, in Pennsylvania, a large manufacturing concern after having its furnace cleaned, had kindling placed therein pre-

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paratory to getting up steam when the factory opened for business the following morning. The water had been drawn off from the boiler, and the manhole left open. It was claimed that a stranger, or some one who had no right to do so, set fire to the kindling, which resulted in a damage of several hundred dollars to the boiler and setting. The claim rightly or wrongly was allowed on the theory that with respect to the insured the fire was hostile, for the reason that although a furnace is ordinarily intended to hold fire, it not intended that a fire which needs watching should be lighted indiscriminately by strangers at any time, and certainly not irrespective of conditions. If this fire had been lighted by the insured or any one of his employees while acting within the scope of his authority, the claim would not have been recognized, notwithstanding the fact that the boiler was not in condition to withstand the effects of the fire.

A decision directly in point has just been handed down by the Supreme Court of Kansas in the case of McGraw, Trustee, vs. Home Insurance Company. It was alleged that some unknown person gained entrance to the laundry, drained the boiler, turned on the natural gas, kept the fire going until the boiler was destroyed and then turned off the gas and retired from the building. The court while admitting that under such a state of facts the fire would doubtless be regarded as hostile and the insurer held liable, concluded that the theory advanced presented features of such inherent improbability that it ought not to be adopted except upon evidence tending to exclude any more reasonable hypothesis. As no such evidence was presented the court decided that an inference of malicious injury by an outsider was not fairly deducible, and held that the insurer was not liable (45 Ins. Law Jour. 193). 144 Pac. Rep. 821.

Where the insured places anything on a stove for the purpose of cooking, heating or warming, and the stove becomes over-heated, causing the article to become charred and give off an oily or greasy smoke which damages the building and contents, it has been held that the insurer is not liable.

There is but one discordant note to mar the harmony of these decisions, and that comes from Wisconsin. A servant built a fire in the furnace with paper and cannel coal, not used or intended to be used for such purpose, and in a short time the fire, which was confined to the furnace, became so violent as to fill the house with smoke, soot and intense heat, resulting in a damage of several

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hundred dollars to the property. The Wisconsin Supreme Court, one justice dissenting, held that the fire was extraordinary and unusual, unsuitable for the purpose intended, and in a measure uncontrollable, besides being inherently dangerous because of the material used. The fire was accordingly declared hostile within the contemplation of the policy, and the insurer held liable.

O'CONNOR v. QUEEN INS. CO.,
140 Wis. 388.

This is the only court which has varied from the time-honored principle that the insurer is not liable for loss caused by a so-called friendly fire. There was a strong dissenting opinion, but the fire in the furnace was so unusual and the heat so intense that the majority of the court could not, apparently, refrain from arguing itself into the belief that it had lost its friendly nature and should be regarded as hostile.

Singularly enough, no claim for loss by heat or smoke from a bonfire has ever been before the courts for adjudication, probably because losses of this nature are usually small. The word "bon-fire," viewed in the light of its possible etymological significance, seems friendly, but whether it be derived from the French or not—and this is open to question—a bon-fire is anything but a good fire. Inasmuch, however, as the civil authorities, fire departments, property owners and the long suffering community make no objection to these fires being kindled, and put forth no effort to extinguish them, this may be taken as presumptive evidence that they are looked upon by the public generally as friendly, and it would certainly seem that they should be so regarded, at least with respect to those who intentionally light them, if not with respect to others.

Although the insured must show that he has sustained a loss by fire within the meaning of the policy before he can recover against the insurers, it is not necessary for him to show that the property injured has actually been burned by the fire. It is sufficient if he proves that fire was the proximate, that is, the dominant, efficient cause of the loss. For example, the insurer is liable for damage by smoke, by water used to extinguish the fire, by the operations of firemen and others, by falling walls, by exposure during the fire, or by reasonable removal; also damage by explosion when explosion is caused by fire; also loss by theft, or injury caused by intentional blowing up of building by the civil authorities to prevent the spread of a conflagration, unless there are express stipulations to the contrary in the policy.

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Damage caused by a fire engine on its way to a fire is not a loss coming under the protection of the policy; (*Foster vs Fidelity Ins. Co.* 24 Pa. S. Ct. 585); nor damage caused by a fire department which breaks into a building under the mistaken assumption that a fire is in progress; but losses of the latter description are usually small and there is a general inclination on the part of the insurers to give them favorable consideration.

An explosion caused by an explosive substance such as gunpowder coming into contact with fire is, strictly speaking, a fire of inconceivable rapidity, though it can hardly be considered fire in the popular sense. But many of the older decisions held that the ignition of gunpowder constituted fire within the meaning of a policy of fire insurance, and doubtless on account of these decisions the insurers inserted the condition exempting themselves from liability for loss caused by the explosion of gunpowder, camphene, or any explosive substance, and later the clause as it appears in the standard policy, which expressly declares that the company shall not be liable for explosion of any kind unless fire ensues, and in that event, for the damage by fire only.

The most famous among the older cases bearing on this subject is that of *Scripture vs. Lowell Mut. Fire Ins. Co.* decided in 1852, 10 Cush. (Mass.) 356; 57 Am. Dec. 111). The tenant's minor son carried a cask of gunpowder into the attic of the building without plaintiff's consent, and fired it with a match. The gunpowder exploded, set fire to a bed and clothing, charred and stained some woodwork and blew off the roof of the house. The Court held that the entire damage by combustion and explosion was covered by the policy.

The question as to what is the legal test of the existence of causal relation is one concerning which there is a great diversity of opinion. Philosophers, metaphysicians and logicians for centuries have busied themselves with the subject; the philosophers and logicians differ with the jurists, and the jurists differ with each other; and in no branch of business have we more striking or more interesting illustrations than in that of fire insurance.

From the numerous definitions of proximate cause which have been given, the following is taken from an opinion rendered by our highest court: "The question is not what cause was nearest in time or place to the catastrophe. That is not the meaning of the maxim, *causa proxima non remota spectatur*. The proximate cause is the efficient cause, the one that necessarily sets the other

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causes in operation. The causes that are merely incidental or instruments of a superior or controlling agency are not the proximate causes and the responsible ones, though they may be nearer in time to the result. It is only when the causes are independent of each other that the nearest is, of course, to be charged with the disaster."

THE G. R. BOOTH,
171 U. S. 450.

One of the most celebrated cases, outside of insurance, involving the question of proximate and remote cause, is one recorded in Blackstone (2 Wm. Blackstone 893; 3 Wilson 403) which is familiar to all law students, that of *Scott v. Shepherd*, familiarly known as the "Squib case." Blackstone dissented and the majority of the Court reached their conclusions along different lines of reasoning. The defendant, a lad, threw a lighted squib or serpent made of gunpowder, from the street into the market house, where a large concourse of people were assembled. The lighted squib fell upon the stand of one Yates, where ginger bread, cakes and pies were sold. To prevent injury to himself and the wares of Yates, one Willis instantly took up the squib from the stand and threw it across the market house, when it fell upon another stand of one Ryal, who sold the same sort of wares. Ryal instantly took up the squib to save his own goods and threw it into another part of the market house. In its passage it struck the plaintiff in the face, and bursting, put out one of his eyes. A recovery of £100 by the plaintiff was sustained by the English Court of Common Pleas.

This seemingly far fetched though perhaps logical decision has a parallel in a well known insurance case, to wit: *Lynn Gas & Electric Co. vs. Meriden Fire Ins. Co.* 158 Mass. 570, 33 N. E. 690, 29 L. R. A. 297, 35 Am. St. R. 540. A fire occurred in the tower of a building through which electric light wires were carried. The fire was confined to the tower, and the damage there was slight, but it caused a short circuit which resulted in bringing into the dynamo below an increase of electric current. This caused a greater resistance to the machinery, which was transmitted to a pulley through a belt so that the shock destroyed the pulley. By the destruction of that pulley the main shaft was disturbed and the succeeding pulleys up to the jack pulley were ruptured. By reason of pieces flying from the jack pulley, or from some other cause, the fly wheel of the engine was destroyed, the governor broken, and everything crushed. This general disruption occurred in a part of

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the building remote from any fire and the Court held that the whole loss was by fire within the meaning of a Massachusetts standard policy.

Both of the foregoing decisions are in quite striking contrast to that rendered by the New York Court of Appeals in the familiar case of *Ryan v. New York Central & Hudson River R. R. Co.*, 35 N. Y. 210 (1866), which is very frequently referred to, and in not particularly complimentary terms, in connection with the question of proximate and remote cause. The Court, actuated to a great extent, apparently, by considerations of public policy, ruled in substance that recovery could be had from the Railroad Company only for the burning of the first building ignited, and that it made no difference that the burning of the second building was a probable consequence of the burning of the first. This view, which is unsound in principle, and which is opposed to an overwhelming weight of authority, has been somewhat modified in later decisions by the Court of Appeals.

HOFFMAN v. KING,
53 N. E. 401.

WEBB v. R. R.,
49 N. Y. 420.

The same strong inclination on the part of New York's highest Court to discover some new and wholly independent cause intervening between the original cause and the ultimate effect, as revealed in the above cases, is apparent in the celebrated insurance case of *Hustace vs. Phenix Ins. Co.*, 175 N. Y. 292, 67 N. E. 592, where the loss was caused solely by concussion due to an explosion from a hostile fire in the Tarrant Building, fifty-six feet and eleven inches distant, and separated from it by two buildings and an alleyway. The Court of Appeals in this case, one Justice dissenting, reversed the unanimous decision of the court below and held that the loss was not by fire but by explosion, and that the insurer was not liable.

This decision has been quite severely criticised, but it seems to be in entire harmony with those in other states where similar conditions have been under consideration; in fact there does not appear to be a single case of concussion damage on record where the insurer has been held liable under the standard policy or under any policy containing the explosion exemption clause.

But, in a case decided by the United States Supreme Court (*Insurance Co. v. Tweed*, 7 Wall (U. S.) 44), an explosion occurred in a certain warehouse. The fire which followed crossed

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the street and communicated to a mill, and from there to the warehouse containing the property of the plaintiff. The Court held that there was no intervening cause; that the explosion was the proximate cause of the loss, and as the policy contained the explosion exemption clause the insurer was not liable. It may have been on account of this decision by our highest court that the words "unless fire ensues" were added to the explosion clause in the modern policy.

There is some conflict in the authorities upon the question whether, under a policy phrased like the New York Standard, an explosion occurring during the progress of a fire, should be treated as a mere incident of the fire, the latter being regarded as the efficient cause of the damage, or whether the explosion should be considered proximate in reference to the loss caused thereby, and the insurer be exempt from liability for such damage by reason of the exemption clause of the policy. The over-whelming weight of authority is to the effect that where the fire occurs in the property described in the policy, and an explosion takes place therein during the progress of the fire, such explosion is with respect to such property a mere incident of the preceding fire, the latter being treated as the efficient cause, and the whole loss is within the risk assumed, although the policy in terms excludes liability for loss by explosion.

The undoubted intention of the underwriters when inserting the explosion provision, was not so much for the purpose of exempting themselves from liability for loss by incidental explosions resulting from raging conflagrations occurring in and confined to the buildings in which they originate, where the amount of the explosion damage is practically indeterminate, but rather with the view of eliminating claims for loss by explosions resulting from sparks or small fires, or from causes which are in fact unknown, but which for insurance purposes are attributed to fire, as for instance the Washburn mill loss in Minneapolis in 1878, and the recent Wheeler claim in Buffalo, (*Washburn vs. Insurance Co.*, 2 Fed., 304; 29 Fed. Cas., 308, 329, 330; *Wheeler vs. Phenix Ins. Co.*, 41 Ins. Law Journal, 247; 92 N. E. 452). In fact, the intention of the insurers was to exempt themselves from liability for loss by explosion of any kind including those caused by fire, as was correctly stated by the New York Court of Appeals in its dictum in the case of *Briggs vs. N. B. & Mercantile Insurance Co.*, 53 N. Y. 446, and referred to with favor by the same Court in the *Hustace* case. This would, of

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course, naturally include within the exception loss caused by concussion.

Let us see, therefore, what value, if any, remains in the explosion exemption clause in the light of the decisions referred to. If the loss were caused by explosion not preceded by a hostile fire, the exception would be unnecessary, for the insurer would not be liable even if the policy did not contain such a provision. It will not do to say that there is room for the exception because explosions are frequently produced by flame, as by a lighted match, a gas jet, burning lamp, fire in a furnace, and the like; in short, for loss caused by a friendly fire, because the insurer would not be liable for loss by explosion as an incident of such a fire, any more than it would be for any other incidental damage resulting therefrom, even in the absence of the exception. Then again, inasmuch as concussion losses in neighboring property are distinguished from those in the premises where the fire and explosion originate, it can be only on the theory that the concussion of the air due to the explosion is, with respect to such outside property, an independent, intervening cause between the hostile fire and the final effect, and if this be true, then the explosion or concussion, and not the fire, would be the proximate and efficient cause, and the insurer would not be liable even if there were no exception. The fundamental principles underlying friendly fires and proximate and remote cause cannot be affected by the presence or absence of the explosion provision.

There is, however, an intimation in the decision in the *Hustace* case (*supra*) which was one involving loss by concussion, that if it were not for the exception there might have been a recovery as for a loss by fire, but this declaration, if such it be, amounts to an admission that the explosion or concussion is not an intervening cause but an inevitable effect and a mere incident of the fire. Can it be possible that the Court intended to imply that the proximity of the cause can shift according to the presence or absence of a stipulation in the policy exempting the company for the explosion loss? And yet, the suggestion that the absence of the explosion exemption clause might have imposed a liability upon the insurer, seems to make for the contention that what, under a given set of circumstances, will be deemed to be the proximate cause, will vary with the introduction or omission of a provision inserted for the purpose of relieving the insurer from liability for a certain species of risk it has concluded not to assume. So much emphasis, however, has been laid upon the exemption provision in the decisions,

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as a possible controlling factor, that it is perhaps fortunate for the insurers that they were not under the necessity or relying entirely upon the principle of proximate and remote cause as a defense in this class of cases.

But where, under a marine policy which did not contain an explosion exemption provision, plaintiff's vessel was insured against fire, and a fire broke out under freight cars loaded with explosives, which exploded, causing another fire, which in turn caused a greater explosion, damaging by concussion, the vessel, about one thousand feet away, it was held that plaintiff could not recover on the policy since the fire was not the proximate cause of the damage, viewed within the reasonable expectation and purposes of the ordinary business man in making such a contract especially in view of the distance of the explosion from the vessel.

BIRD v. PAUL F. & M. INS. CO. (1818)
Ins. Law Journal 52, 481; 120 N. E. Rep. 86.

In Louisiana a fire broke out about 180 or 200 feet distant from the property of plaintiff, in a building containing a quantity of gunpowder, and in about thirty minutes the gunpowder exploded. The explosion produced such concussion of the air as to cause a damage of about \$950.00 to plaintiff's property. The fire continued in the town for forty-eight hours, but did not reach the building in question, that being unharmed except from the concussion. The court which discussed the question at considerable length and apparently based its conclusion upon the supposed intent of the contracting parties, in the course of its remarks said: "Perhaps after all, it might be safe here, as in other contracts, to inquire whether the loss was within the reasonable intendment of the parties when they made the contract. Did they intend by an insurance against fire to cover losses arising from the concussion of the air produced by an explosion of gunpowder upon the premises of other persons than the insured? We think such an extraordinary result could not have been contemplated by the parties. We do not think insurance companies can be considered responsible for the consequences of the combustion of gunpowder, unless that combustion has happened in the premises insured, or the gunpowder is itself, with other merchandise, covered by the policy."

CABELLERO v. HOME INS. CO.,
15 La. Ann. 517.

In Mitchell vs. Potomac Ins. Co. 183 U. S. 42; 22 Sup. Ct. 22; 46 L. Ed. 74, plaintiff's clerk went down into the cellar of the store, which was occupied for the sale of stoves and tinware. He

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lit a match because it was dark, and the lighted match came in contact with the vapor of gasoline kept in the cellar, and a violent explosion at once followed, causing a collapse of the building. It will be observed that this was a friendly fire, and the Court held that the loss was by explosion, and that the insured could not recover.

Where an explosion was produced by the lighting of a match in a basement filled with illuminating gas, and goods covered by the policy were damaged, but not by burning, and where an inflammable and explosive vapor evolved in the course of the process of extracting oil from shoddy afterward exploded, causing considerable damage, it was held that the insurers were not liable.

HEUER v. N. W. NAT. INS. CO.

144 Ills. 393.

STANLEY v. WESTERN INS. CO.,

3 L. R. Ex. 71.

In an English case where there was no exception in the policy, it was held that no liability attached where it appeared that the damage which occurred to the premises was occasioned by a concussion of a large quantity of gunpowder at a magazine about half a mile distant.

EVERETT v. LONDON ASSURANCE CORP.,

115 E. C. 19 C. B. (N. S.) 126.

In a case where the plaintiff's premises adjoined a mill which took fire and shortly after exploded, blowing the plaintiff's house off its foundation and almost ruining it, it was held that the insurer was not liable.

MILLER v. LONDON & LANCASHIRE INS. CO.,

41 Ill. App. 395.

In *German Fire Co. vs. Roost*, decided by the Supreme Court of Ohio (26 Ins. Law Journal, 699) the plaintiff's policy contained the usual explosion clause, and also a special clause insuring against any loss or damage caused by lightning. A powder house situated across the street seventy-one feet away, was struck by lightning; an explosion occurred and plaintiff's house was destroyed by the concussion. It was held that the plaintiff could not recover; and the Court said: "In no case which has come within our observation—and we have examined a great many—has a liability been found to attach where there was a provision excluding liability for loss by explosion and loss was caused by fire, or as here, by lightning taking effect in a distant building, and the damage being wrought to the insured property by an explosion produced by the fire or the lightning without either of the latter agencies coming in contact with the insured property."

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In *Hall & Hawkins vs. National Fire Ins. Co., Tenn.* (35 Ins. Law Journal 507) a fire occurred in a hardware store in Knoxville, Tenn., and ignited powder stored therein. A tremendous explosion followed, shaking the whole city and the country for miles around. The resultant concussion damaged plaintiff's stock contained in a building between thirty and forty feet distant, to the extent of several thousand dollars. Held, that the insurer was not liable.

The English decisions are in accord with the American decisions in respect of these concussion damages, and although they may seem to be in conflict with the oft quoted first Baconian maxim, it is evident that the line must be drawn somewhere, otherwise, as was said by Ryles, J., in an English case (*Everett vs. London Assurance Co.* 19 C. B. (N. S.) 126) if a ship was in the neighborhood of Etna or Vesuvius and was shaken by an eruption, that would be a damage by fire; or if a gun were fired off, loaded with small shot, among crockery, that would be a damage by fire; or it might be said that if the heat of the sun were too great, that would be a damage by fire.

Where an adjoining building burned, and as the result of fire a party wall fell and carried with it the partition wall and part of the building covered by the insurance, it was held to be a direct loss by fire.

ERMENTROUT v. GIRARD, F. & M. INS. CO.
63 Minn. 305; 65 N. W. 635.

Where a building was destroyed by fire, leaving some of the walls standing, and two days thereafter one of the walls fell, damaging the building covered by the insurance, it was held to be a loss within the policy.

SCOTTISH COURT OF SESSIONS 7,
Cases in Ct. of Sessions 52, 1 Bennett 259.

Where, for a week after a fire a high wind prevailed and on the seventh day, while a wind amounting to a gale was blowing, a high wall belonging to the burned building fell over on to the adjoining building, crushing its roof and doing considerable damage, the Court sustained the finding of the jury that fire was the proximate cause of the loss, and therefore covered by the policy.

RUSSELL v. GERMAN FIRE INS. CO.,
(Minn.) 1907; 111 N. W. 400.

The climax in this line of decisions (it is to be hoped) was reached in an Alabama case ~~wier~~, four months after a fire, the wall of an adjoining building was blown over on to the building

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occupied by the insured, during a high windstorm, and the Court left it to the jury to determine whether it was a direct loss by fire and whether the insured was guilty of negligence in not moving the goods from danger in accordance with the provisions of the policy. The decision was in favor of the plaintiff. If the line of liability could not be drawn at four months, it would seem that in the mind of the Alabama Court there would be no point in the matter of time at which the line could be drawn. The more logical and reasonable portion of this decision would seem to be found in the three closing words: "Sayer, J., dissents."

WESTERN ASSURANCE COMPANY v. HANN,
(1917) 51 Ins. Law Journal 648, 78 Sou. Rep. 232.

It is suggested, however, that in cases of this character the right of subrogation might be of value to the insurer against the owner of a building who permits the walls to remain standing for an unreasonable time without taking proper precautions to prevent their falling.

But in a Georgia case it was held that damage to office fixtures resulting from the fall of the building twenty-five days after the fire was not covered, the building having in the meanwhile been repaired, and heavy rains having fallen which tended to weaken the structure.

CUESTA v. ROYAL INS. CO.,
98 Ga. 72, 27 S. E. 172.

In the absence of a stipulation in the policy to the contrary, the insurer would be liable for loss caused by the destruction of property by the order of civil authorities to prevent the spread of a conflagration, and the point is well argued in *City Fire Ins. Co. vs. Corlies* 20 Wend, (N. Y.) 367. The standard policy, however, contains a special provision covering this contingency, which was no doubt prompted by this and kindred decisions.

The weight of the decisions is in favor of the doctrine that not only loss by removal but also for the expense of removal is a direct loss by fire, whether the building containing the goods be actually on fire or in imminent danger of burning, even without any special provision in the policy. Some doubt, however, has been expressed with respect to the item of expense unless liability therefor is specifically assumed.

In the absence of conditions to the contrary, the insurer under a fire insurance policy is liable for goods stolen during a fire, but

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the standard policy and others in current use contain an express provision exempting the insurance company from such liability.

It has been suggested that the condition making the policy void if the insured neglects to use all reasonable means to preserve the property at and after a fire, or when the property is endangered by fire in neighboring premises, and the condition exempting the insurer from liability for loss by theft, are inconsistent with each other and that the latter should therefore not be enforceable.

In support of this view the argument is advanced that the effect of these two clauses is to subject the property to a risk against which the insured has no protection; that if the property is negligently lost by theft no clause is necessary; and as property is quite likely to be stolen if removed from a building, the more effectually the insured complies with the conditions of the contract, the more effectually he diminishes his own security. But a Missouri court which held the insurer liable for loss by theft when the policy contained no exemption provision, sustained the validity of the provision in another case, and in a most remarkable decision brushed aside all arguments directed against the alleged inconsistency in the two conditions.

WEBB v. PROTECTION & AETNA INS. CO.'s,
14 Mo. 3; 3 Bennett 509.

NEWMARK v. L. & L. & G. INS. CO.,
30 Mo. 160; 4 Bennett 464.

Eminent authorities, however, hold that the insurer is not liable under the New York standard policy either for the expense of putting out a fire or of protecting the property at and after a fire, and there are several decisions supporting this view.

HEBNER v. PALATINE INS. CO.,
157 Ill. 144—152.

WELLS v. BOSTON INS. CO.,
6 Pick. (Mass.) 182.

RALLI v. TROOP,
157 U. S. 386—405.

Except where it is otherwise specifically provided, the insurer will not be liable for consequential damages, such as loss of the use of a store or factory, loss of rents, the incidental loss of trade and consequent loss of prospective profit, these being regarded as too remote, and not supposed to enter into the calculation of the contracting parties. Thus a policy on a bridge does not cover incidental loss of tolls from the adjacent turnpike belonging to plaintiffs.

FARMERS INS. CO. v. NEW HOLLAND TURNPIKE CO.
122 Pa. 37, 15 Atl. 563.

NIAGARA FIRE INS. CO. v. HEFLIN,
22 Ky. L. Rep. 1212, 60 S. W. 393.

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HAYES v. INS. CO.
170 Mass. 492, 49 N. E. 754.
NIBLO v. INS. CO.
1 Sandf. (N. Y.) 551.

The standard policy contains a condition expressly disclaiming liability, unless specifically assumed, for loss occasioned "by interruption of business, manufacturing process or otherwise." Losses of this nature, however, are taken care of by special contracts in the shape of rent, profit and use and occupancy insurance, which classes in recent years have assumed quite large proportions.

In the absence of an exemption provision in the policy, it has been held that the insurer is liable for any loss which may accrue to the insured by reason of any ordinance or law regulating the construction or repair of buildings; hence, where a city ordinance will not allow a building that has been damaged by fire to be repaired, the insurer, is liable for the entire value of the building, less whatever value remains over the expense of removing it; or, where the building may be repaired, and the ordinance requires changes either of a minor or radical character to be made, the insurer is liable for the additional expense rendered necessary by these changes, unless such liability is expressly disclaimed in the contract.

The proposition is fully discussed in a decision rendered by the Supreme Judicial Court of Massachusetts in the case of Hewins, et al., vs. Insurance Company. Under a Massachusetts standard policy which contains no exemption stipulation, the insurer was held liable, but under a New York standard policy which was involved in the same litigation and which contains an exemption provision, liability was limited to the amount needed to restore the building to its original condition.

HEWINS v. LONDON ASSURANCE CORP.,
184 Mass., 178; 68 N. E., 62 Cf.
BRADY v. INSURANCE CO.,
11 Mich., 425.

MONTELEONE v. ROYAL INS. CO.,
47 La. Ann. 1563.

HAMBURG BREMEN INS. CO. v. GARLINGTON,
66 Tex., 103.

LARKIN v. GLENS FALLS INS. CO.,
80 Minn., 527.

PENN. CO. v. PHIL. CONTRIBUTIONSHIP
201 Pa., 497.

The Standard Policy Law of Massachusetts does not, apparently, preclude the insurer from stipulating against such liability, and a clause has been adopted in Boston expressly disclaiming liability, unless specifically assumed, beyond the actual value of

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the property described, at the time the loss occurs, or beyond what it would then cost the insured to repair or restore it to the condition in which it was immediately before the loss occurred. And if the assured desires protection against the demolition and increased cost of construction, it can be secured by having a rider covering this feature attached to the policy, in consideration of an additional premium.

The question as to what is a consequential loss is one not entirely free from difficulty. It arises most frequently in connection with breweries, packing houses and cold storage plants. Where the cooling apparatus is located in the same building as the stock, there is no question as to liability for the incidental damage to the latter on account of the interruption of the process of refrigeration. It is where the stock is stored in a building which depends for its refrigeration upon an ice plant located in an adjacent or distant building, that the question of liability for so-called consequential damage presents itself.

Several years ago, in a western city, a large packing house, including the refrigerating plant, was destroyed by fire. About one hundred feet distant from the ice plant, and connected therewith by a cold air conductor, were two storage warehouses, containing about five million pounds of meat. No fire, smoke or water entered the storage buildings, the only damage to the meats therein being that due to a rise in temperature from the shutting off of cold air from the ice plant. The insured asked the consent of the local representatives of the insurance companies to "handle the salvage," and supposing that reference was made to the salvage in the packing house proper, consent was given, whereupon the insured took the entire stock in the two warehouses, shipped some to Boston, some to Buffalo, and some to other places, and presented a claim to the companies for loss and expenses incurred of about \$250,000.00. The companies took exception to the amount of the claim, and demanded an appraisal, which resulted in an award of nearly \$50,000.00 more than the original claim. The policies simply covered on stock in the warehouses, and contained no reference to consequential loss. This is probably the largest loss of the kind on record.

There never has been any court decision bearing directly on this question, and when the above loss occurred, some insurers, although willing to admit that if the whole plant, including the warehouses and contents, had been written under blanket policies

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for single premiums the entire property might possibly have been regarded as one risk, took the position that inasmuch as the contents of the warehouses were written under specific policies which had no connection with the general insurance covering the packing house plant, no liability existed for damage to the stock caused by the rise in temperature. If the case could have been tried unaffected by the element of waiver, the court would no doubt have inquired, as in other contracts, whether the loss was within the reasonable intentment of the parties.

If, as has uniformly been held, damage to adjacent property by explosion caused by fire, is regarded as too remote to come within the protection of the policy, it is not clear why the same reasoning does not apply, with equal force, to damage by rise in temperature caused by fire in a neighboring building. If the loss is not regarded as the inevitable physical effect of the fire, in one case, it is not easy to perceive why it should be in the other. And as a matter of principle, it should make no difference whether all the buildings are owned by one man, or whether there are separate ownerships.

In order to guard against any question arising in case of loss on this class of property, policies are now written expressly disclaiming liability for consequential loss, and if the insured desires insurance of this nature, he can secure it by taking out a separate policy covering such risks, or by having an endorsement made on his policy and paying an additional premium therefor.

Let us hear the conclusion of the whole matter. Within the meaning of an ordinary policy of insurance the word "fire" must be construed in its ordinary popular sense, and not be given such technical or restricted meaning as might be applied to it upon scientific analysis. There must be something besides mere combustion; the element of flame or glow must be present. The fire must be without intent on the part of the insured or his responsible agent to injure the property; it must be accidental with respect to the insured. If intentionally kindled for a useful purpose in a place specially designed or provided, the fire does not change its character because the flame extends unusually high, or the heat becomes excessive, or smoke escapes therefrom and causes damage. The fire must be hostile as distinguished from what is universally regarded as friendly, and it must be the proximate and not the remote cause of the loss.

If a hostile fire causes an explosion, the fire is held to be the efficient cause of the whole loss which ensues in the premises where

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it originates when its effects are produced in direct sequence, though one of the incidents of the sequence may be an explosion, on the theory that it could not have been intended to nullify such predominant cause by the explosion exemption provision.

If as the result of a hostile fire the concussion of the air causes damage to neighboring property, the explosion or concussion, and not the fire, is held to be the proximate cause of the loss. If a friendly fire causes an explosion, none of the damage resulting can be regarded as a loss by fire.

There are probably some phases of this question which have not been touched upon, and new conditions will no doubt arise to tax the ingenuity of the layman, the lawyer, and the jurist, but a careful study of the text writers, and an analysis of the decisions all tend to confirm and emphasize the correctness of the propositions laid down in the beginning of this address, and to demonstrate that they are fundamentally sound.

XV

THE TRUE PURPOSE OF THE LOSS SETTLEMENT

ALLEN E. CLOUGH

*Secretary, Committee on Losses and Adjustments, New York Board
of Fire Underwriters*

The true purpose of the loss settlement under the obligations assumed in a fire insurance policy by the insurer is, of course, to meet fully the requirements of the contract entered into. The definitions of the terms "insure," "insurer" and "insurance" have changed but little, if any, since the earliest days of the business and no claim to originality of ideas can be made as to the thoughts about to be presented.

As will be noted, large use is made of many of the leading works on insurance, the effort now being to merely condense into this necessarily limited statement, the nature of the contract, the reasons therefor and the support these have had by the courts and long established and recognized practice.

What do we mean when we say we insure? Exactly what property or interest do we intend to cover by the contract, under the policy form attached? And, having agreed to insure, and come to an understanding with our client as to what we insure, what shall our attitude be when the client becomes a claimant?

The Century Dictionary defines *Insurer*: "To guaranty indemnity for future loss or damage on certain stipulated conditions." Webster's International defines *Insurance*: "A contract whereby, for a stipulated consideration, called a premium, one party undertakes to indemnify or guarantee another against loss by a certain specified contingency or peril * * * *Fire Insurance*, insuring for a given period against loss from injury to specified property by fire * * *." *Insurer*: "One who contracts to indemnify another by way of insurance."

Indemnity is defined in the Century Dictionary as, "Security given against or exemption granted from damage or loss. Compensation for loss or damage sustained—reimbursement. More specifically, an obligation to provide for future reimbursement in case loss should occur. If the object of a contract for indemnity is expressed as being to secure against loss or damage * * * the obligation becomes enforceable only when loss or damage has been incurred."

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Webster's International says: "*Indemnity*: compensation for loss, damage or injury sustained; as, insurance is a contract of indemnity."

The Standard Dictionary defines "*Insurance Loss*: injury or diminution of value within the limits provided in a policy, or the sum payable on that account."

That early writer, Roccus, says (De Assecur, not. 1): "*Asscuratio est contractus quo quis alienae rei periculum in se suscepit, obligando se, sub certo pretio, ad eam compensandam, si illa perierit.*" This has been well translated in May on Insurance (1-1) as, "Insurance is a contract whereby one, for a consideration, undertakes to compensate another if he shall suffer loss."

Richards on Insurance Law (p. 27) says: "At the very outset it must be noted that insurance is a contract of indemnity."

Mr. Justice Lawrence, in *Lucena v. Crauford* (2 B. & P. N. R. 269 (H. L. 1806), pp. 301-303), in answer to questions proposed by the judges, after citing the definitions of Vallin, Roccus and others, said: "Insurance is a contract by which the one party, in consideration of a price paid to him adequate to the risk, becomes security to the other that he shall not suffer loss, damage or prejudice by the happening of the perils specified to certain things which may be exposed to them."

(Wambaugh, Cases on Insurance, p. 30.)

Park on Insurance (p. 1) says: "Policy is the name given to the instrument by which the contract of indemnity is effected between the insurer and the insured; and it is not like most contracts signed by both parties, but only by the insurer, who, on that account, it is supposed, is denominated the Underwriter. Notwithstanding this, there are certain conditions * * * to be performed as well by the person not subscribing as by the underwriter, otherwise the policy will be void."

Adam Smith, in his "*Wealth of Nations*" (1-10), which has been called "the best foundation for the study of political economy," refers thus to Insurance: "That the chance of loss is frequently undervalued, and scarce ever valued more than it is worth, we may learn from the moderate profit of insurers."

Angell on Insurance (p. 1) says: "A contract of indemnity is given to a *person*, against his sustaining loss or damage, and cannot properly be called one that insures the *thing*, it not being possible so to do; and, therefore, as Lord Hardwicke has said in *Sadlers Co. v.*

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Badcock (2 Atk. 554), it must mean insuring the person from damage; this is, damage to the thing or to his property."

"The contract for insurance is not an insurance of the subject matter, but an agreement to indemnify a particular person from any damage he may sustain by the destruction of his interests in the article, by any perils insured against."

May on Insurance says (I. 1. p. 4): "It had its origin in the necessities of commerce, * * * wherever danger is apprehended or protection required, it holds out its fostering hand, and promises *indemnity*. This principle underlies the contract, and it can never, without violence to its essence and spirit, be made by the assured a source of profit, its sole purpose being to guaranty against loss and damage. 'Though based on self-interest,' says De Morgan, 'yet it is the most enlightened and benevolent form which the projects of self-interest ever took. It is, in fact, in a limited sense, a practical method, the agreement of a community to consider the goods of its individual members as common. It is an agreement that those whose fortune it shall be to have more than average success shall resign the overplus in favor of those who have less.'"

I do not hesitate to quote at considerable length from a recent English work, "Welford & Otter-Barry's Fire Insurance," as the theory of the fire insurance contract is so clearly expressed therein. (p. 1) "A contract of fire insurance is a contract one person undertakes in return for the agreed consideration to indemnify another person against loss or damage occasioned by fire up to the agreed amount." (p. 5) "The contract of fire insurance, like all other contracts of insurance, differs from an ordinary contract in that it requires, throughout its existence, the utmost good faith, or *uberrima fides*, as it is called, to be observed, on the part of both the assured and the insurers." (p. 6-7) "The contract of fire insurance resembles the contract of marine insurance and differs from that of life assurance in that it is purely a contract of indemnity against losses actually sustained. Even where by the terms of the contract, as is usually the case, the insurers expressly undertake in the event of loss or damage by fire to the property insured, to pay or make good the loss or damage up to a specified sum, the contract is nevertheless one of indemnity, and of indemnity only."

It is the fundamental principle of fire insurance that the assured, in case of a loss covered by his contract, shall, so far as the sum specified in the contract permits, be fully indemnified, but shall never be more than fully indemnified. This principle is applied in accordance with the following rules, namely:—

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(1) To establish a right to indemnity it is necessary for the assured to show that he has in fact sustained a loss by reason of his interest in the subject-matter of insurance.

(2) The extent of the assured's indemnity must, subject to the terms of the contract be measured by the loss which he has actually sustained.

(3) The assured is, therefore, not entitled to receive anything by way of indemnity, even though the property insured be destroyed by fire, if he has in fact sustained no loss. Thus, if he has parted with the whole of his interest in the subject-matter of insurance before the happening of the fire which destroys it, he retains nothing to which the right of indemnity can attach.

Even where his interest remains at the time of the fire, he may in reality lose nothing, since his loss may have been made good to him by some third person who was under a legal obligation to do so. In neither case, therefore, is the assured entitled to recover anything from the insurers.

It further follows that if his loss has been in any way diminished, his right to indemnity must be proportionately abated.

(4) If the assured has once received from the insurers the full value of the subject-matter of insurance, he cannot retain for himself any benefit whatever arising out of his interest in such subject-matter, by reason of which he would be more than fully indemnified. He is bound, therefore, upon payment of his indemnity to account to the insurers for any compensation which he may receive from any third person legally responsible to him for the loss, and to hand over to them, if it is in his power to do so, whatever remains of the subject-matter of insurance together with all his rights, if any, against third persons arising out of the loss.

In working out the principle of indemnity, it frequently happens that the assured, either with the assistance of the insurers, or on their behalf, sues a person alleged to be responsible for the loss.

The contract is, in theory, a contract of perfect indemnity, subject to the difficulty in practice of ascertaining what is a perfect indemnity and subject also to a possible qualification in the case of valued policies.

(p. 314) (4) The insurers may, however, by the terms upon which they settle the assured's claim, or by their conduct towards the assured, debar themselves from afterwards asserting their rights.

The contract of fire insurance is simple indemnity; it is a contract of personal indemnity; it insures *persons* against such loss as may happen to the *things* described as being the property of the insured or in which they have an insurable interest. (Columbia Ins. Co. v. Lawrence, 10 Pet. 507; Carpenter v. Providence-Washington Ins. Co., 16 Pet. 495.)

As is well known, so-called "valued policies" are sometimes written as a matter of convenience, mainly on property whose value would be difficult of ascertainment or only at unusual expense after a fire, such as pictures and other works of art, rare books and manuscripts, or collections of stamps, coins and other similar property of no intrinsic value except that the expense of obtaining and assembling them has been large. An agreement is reached in advance on the value of the subject of the insurance, which, in event of a total loss, in absence of fraud, is accepted as the basis of adjust-

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ment. Such policies are not provided for under the Standard Policy law of this State, but are perhaps properly written in the absence of any statutory prohibition. As to this class of policies it may be said that, what shall be considered as indemnity under the contracts is agreed upon in advance of the occurrence of a loss which may or may not happen. "The purpose in all cases is alike—indemnity for the loss of a valuable interest."

(May on Insurance, I-1—p. 11) (*Harris v. Eagle Fire*, S. C. N. Y., 1810.)

Compulsory valued policies, provided for by the statutes of a few States, are contracts of an entirely different character, and cannot be defended successfully—they have no connection with the theory on which insurance is based, i. e., indemnity, and are practically wager contracts which are frowned on by the law.

(*Moving Picture Co. Amer. v. Scottish Union & National Ins. Co.*, S. C. Penn., 1914; 94 Atl. 642.) (*Draper v. Delaware State Grange Mutual Fire Ins. Co.*, 91 Atl. 206.) They are believed to foster carelessness on the part of the insured, if not to actually tempt to arson, by all authorities on insurance, including many of the best informed insurance commissioners, and those charged with the administration of the laws of the various states having valued policy laws on their statute books.

Marshall, in his *Treatise on Insurance* (p. 682), says in reference to the early days of fire insurance: "It cannot be denied that this species of insurance affords great comfort to individuals, and often preserves whole families from poverty and ruin, and yet it has been much doubted by wise and intelligent persons whether in a general and national point of view the benefits resulting from it are not more than counterbalanced by the mischiefs it occasions. Not to mention the carelessness and inattention which security naturally creates, every person who has any concern in any of the fire offices, or who has attended the Courts of Westminster for any length of time, must own that insurance has been the original cause of many fires in London, with all their train of mischievous consequences."

That this fear was well grounded must be admitted, for notwithstanding the fact that the courts and the insurance companies have held steadfastly to the theory of indemnity, fire insurance has doubtless been the cause of less care being taken of their property, as to the fire hazard, by many property owners, and not a few have through all the years since its inception looked upon it as a ready market for their belongings, when otherwise not salable, and have

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been led to the crime of arson, to which they would not have been tempted except for the possible profit through the fire insurance policy in their hands. The existence of fire insurance has also often prompted persons who have suffered from fires through natural causes, to make fraudulent claims on their insurers and commit perjury, seeing in the destruction of their property opportunities to make illegitimate profits through misrepresentations as to the values of the property insured.

Mr. George Richards has pertinently remarked in commenting on the famous case of Darrell against Tibbetts, decided by the English courts in favor of the landlord's underwriters and against the landlord, who sought to keep his double indemnity, he being insured against loss by explosion on premises occupied by a tenant who had covenanted in the lease to repair any such loss, the underwriters having paid the loss on its occurrence and the tenant having subsequently made the needed repairs as he had agreed:

The pith and point of our inquiry must be this: Shall the law permit the insured public, including bad men and good men alike, to utilize their insurance contracts as a source of profit? Are such calamities as conflagrations and shipwrecks, imperiling the safety of the public at large, to be converted by canons of insurance law into pecuniary blessings to individuals who are insured against their occurrence, events not to be dreaded and guarded against, but to be hoped for and prayed for, and by unscrupulous men planned for and labored for? If the law allows any man to make a huge profit by his insurance contract, then many a man will deliberately take out and hold insurance with that result in view. If so, he will certainly be apt to welcome a fire, and if he does not deliberately drop the spark that occasions destruction, it is not likely that he will use any special precaution to prevent it. And what sort of a situation then shall we have in the community?

A well-known and successful insurance company has recently said in the leaflet it sends to its agents:

Adjustments should always be an honest, pains-taking, deliberate and thorough effort to ascertain the actual loss. To give the impression that companies are careless or indifferently liberal in handling losses and more anxious to please claimants than to reach exactness, has an obvious hurtful influence. To permit the securing of a more or less profit from a fire has in more instances than we know of suggested an opportunity to the fraudulent and criminal.

One case we do know of, that of a professional fire bug who "suffered" more than a score of fires and finally lodged in the penitentiary for a season. He confessed that his incendiary career was instigated by a quick, careless, lump settlement of an honest damage to his small cigar stock, which gave him some two hundred dollars profit.

No class of business has a greater interest in maintaining the public conscience, business probity, equity and justice, in the highest sense of these terms, than the underwriter. He must mete as he would have measured to him. He cannot promise indemnity and give less. The golden rule is trite, but still above par as a business

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policy. On the other hand, if he is careless or complaisant in meeting the claims made upon him and grants materially more than indemnity, or does not choose his clients wisely, his business is in danger of being considered as conducted contrary to public policy and to the detriment of the community, not only materially, but morally.

The public is much interested in our business, and through insurance commissioners, attorney-generals and investigation committees is constantly inquiring into it; will probably require more information of us in the future than it has as yet. Therefore, aside from our duty as citizens of the commonwealth, it behooves us, from the standpoint of practical common sense, to so conduct our business that we shall not be subject to the criticism that we are lax in our methods and are only interested in the making of the largest profit. We shall only protect ourselves by guarding the community as far as we are able against the occurrence of fires for profit. It is essential to this protection that the origin of fires should be carefully investigated and dishonest claims contested. Because these investigations and contests are expensive and often inconclusive is no argument against them. The underwriter's best interests and those of the public are too closely related for the insurer to buy his peace as cheaply as possible and shut his eyes to the fact that thereby he may be approaching dangerously to essentially compounding a felony.

As has been said, the courts have uniformly held to the theory of indemnity in insurance.

The English Court of Appeal has said, by Judge Brett:

In order to give my opinion upon this case, I feel obliged to revert to the very foundation of every rule which has been promulgated and acted on by the courts with regard to insurance law. The very foundation, in my opinion, of every rule which has been applied to insurance law is this, namely that the contract of insurance contained in a marine or fire policy is a contract of indemnity, and of indemnity only, and that this contract means that the assured, in case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified. That is the fundamental principle of insurance; and if ever a proposition is brought forward which is at variance with it, that is to say, which either will prevent the assured from obtaining a full indemnity, or which will give to the assured more than a full indemnity, that proposition must certainly be wrong.

By Judge Cotton:

I think that the question turns on the consideration of what a policy of insurance against fire is, and on that the right of the plaintiff depends. The policy is really a contract to indemnify the person insured for the loss which he has sustained in consequence of the peril insured against which has happened, and from that it follows, of course, that it is only a contract of indemnity; it is only to pay that loss which the assured

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may have sustained by reason of the fire which occurred. In order to ascertain what that loss is, everything must be taken into account which is received by and comes to the hand of the assured, and which diminished that loss. It is only the amount of the loss, when it is considered as a contract of indemnity, which is to be paid after taking into account and estimating those benefits or sums of money which the assured may have received in diminution of the loss.

And Judge Bowen in the same case uses similar language.

Castellain v. Preston, L. R., 11 Q. B. D. 380 (1883).

The United States Supreme Court accepts this principle in Chicago, etc., R. Co. v. Pullman Car Co., 139 U. S. 79, 88:

The general rule of law (and it is obvious justice) is, that where there is a contract of indemnity (it matters not whether it is a marine policy or a policy against fire on land or any other contract of indemnity), and a loss happens, anything which reduces or diminishes that loss reduces or diminishes the amount which the indemnifier is bound to pay.

Chief Justice Knowlton, of the Massachusetts Supreme Court, said in a recent case:

A contract for insurance against fire in the form prescribed by our statutes is a contract of indemnity, and the assured is only entitled to be put in the same condition pecuniarily that he would have been in if there had been no fire.

The Supreme Court of Louisiana said, in Nicolet v. Insurance Co.:

If the property at risk had been of a value less than this amount, the assured would have been entitled to no more than an indemnity equivalent to their loss and the sum stipulated in the contract reducible to the actual damage. If the property insured exceeded the amount covered by the policy, the indemnity, in the event of a total loss, could not be enlarged so as to afford full protection. (Wambaugh p. 864, S. C. La. 366.)

And later, in Hoffman v. Western Marine and Fire Insurance Co.:

The insurer's liability is distinctly defined by the policy, and by well ascertained principles of the law of insurance. If goods are wholly destroyed by fire, the insurer is bound to make indemnity, by paying their value at the time of the loss. If the goods be not destroyed but damaged, the insurer is bound, by the like rule of indemnity, to pay the assured the difference of value between the goods in their sound and in their damaged condition. The idea of a right of abandonment of the goods, which seems to have existed in the plaintiff's mind, and in that of his principal witness, who assisted him in making out the appraisal, is entirely unsanctioned by the law of fire insurance.

(Wambaugh p. 869, S. C. La. 1 La. Ann. 216.)

The Supreme Court of Illinois, in Illinois Mutual F. Ins. Co. v. Andes Co.:

It is difficult to see how this can be done consistently with principle, under a contract which, we apprehend, this must be admitted to be, to indemnify the reassured against the loss it might sustain from the risk it had incurred in consequence of its prior insurance.

Here followed quotations from Bainbridge v. Neilson, 10 East, 329, 347 (1808), to the effect that a policy of insurance is a con-

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tract of indemnity, per Bayley, J., and from *Hamilton v. Mendes* (1761), per Lord Mansfield, C. J.

(Wambaugh, p. 909, S. C. Ill. 1873, 67 Ill. 362.)

The Delaware Superior Court has recently said in *Draper v. Delaware State Grange Mutual Fire Ins. Co.*:

The contract of insurance against loss or damage to property is a contract of indemnity, and it is an undertaking on the part of the insurer, based upon sufficient consideration, to pay the insured a certain sum of money upon the happening of a certain contingency, i. e. loss occasioned the insured by fire on the property described in the contract.

A contract of insurance is essentially a personal contract, and it is not a contract to insure property against loss by fire, but is one to insure the owner of property against loss by fire; therefore, destruction by fire of the property described in the contract of insurance is not the contingency upon which the insurer promises to indemnify the insured, but it is only when by fire the insured has sustained a loss that the insurer may be called upon to perform its contract of indemnity.

A contract of insurance is a contract of indemnity, and its object is to avert a loss rather than to allow a gain, and a policy of insurance against loss to the insured on property in which the insured has no interest amounts to a wager, and wager policies are void upon the ground that they are contrary to public policy.

(91 Atlantic, 206.)

Our own New York Supreme Court said many years ago in *Kernochan v. New York Bowery Fire Ins. Co.*, a case affirmed by the Court of Appeals:

It is indeed true, as was insisted by the counsel for the defendants, that in this State, since wager policies have been abolished, the assured, whether in a marine or fire policy, can never be permitted to recover more than a full indemnity for the loss which it is proved that he sustained. (Wambaugh p. 915, 12 N. Y., S. C. 1.)

And the Appellate Division of the same Court, in 1912, in the case of *Heilbrunn v. German Alliance Ins. Co.*, said:

The contract of insurance with the mortgagee was nothing more than a contract of indemnity, and the liability of the insurer was measured, not by the amount of the policy, but by the amount of loss incurred by the insured. * * * If the defendant is, as in the present case, merely an indemnitor, and the plaintiff has, before suit brought, been paid from other sources all or part of the amount for which the indemnitor had undertaken to be liable, it is perfectly competent to show that fact by way of defense, and thus reduce the amount recoverable.

(S. C. N. Y., App. Div. 1912) 135 N. Y. Supp. 769.

Many other references could be quoted, but these appear sufficient for our present purpose to establish the fact that, from the early days of insurance to the present, there has been no serious divergence—that the fire insurance contract is one of indemnity only.

We have perhaps been prone to regard the well-known and often referred to decisions in the cases of *Foley v. Manufacturers Fire Ins. Co.* (152 N. Y. 131) and *Michael v. Prussian National Ins. Co.* (171 N. Y. 25), both decisions of the N. Y. Court of Appeals,

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as departing from the indemnity theory, but may not the real facts be, as Mr. Richards has pointed out, that in the first the payment was due to the insured, since up to the time of the trial the contractors had not reinstated or rebuilt, in whole or in part, notwithstanding their agreement so to do, and that therefore the present liability at issue in the case was clear. No question of subrogation was presented to the Court, and it is possible that had the loss been paid and the attempt had then been to enforce the right of subrogation the decision might have been more in line with that in the case of *Darrell v. Tibbitts*, already referred to. And, as to the case of *Michael v. Prussian National Ins. Co.*, Justice Gray's opinion was evidently based on "1st, that the underwriters had not yet made payment," and were therefore not entitled to claim subrogation, and, "2nd, that the subject matter of the insurance is not the same as the subject matter of the pooling agreement"—or, in other words, that the insurance payment enforced was considered only as the indemnity contracted for. In neither case was the question of double payment considered as actually presented. Chief Justice Andrews said: "This flows from the nature of the contract of insurance, which is a contract of indemnity, and where there is no interest there is no room for indemnity." And, doubtless, Justice Gray would unhesitatingly endorse the theory of indemnity, when presented concretely.

It has been argued that the case of *Irwin v. Westchester Fire* (58 Misc. 441), affirmed by the Court of Appeals, without opinion (199 N. Y. 550), is a qualification of the doctrine of indemnity applied by the English and United States Supreme Courts. The assured had erected a frame addition to her building in violation of a city ordinance. The Supreme Court, at a special term, in a proceeding to which the owner was not a party, had adjudged the "addition" to be in violation of the said ordinance and a nuisance, and directed the removal by the Common Council. The authorities neglected to obey, and later the owner brought an action to restrain the removal of the "addition." Six months later the court found, as a matter of fact and law, that the addition was a violation of the ordinance and nuisance, and fourteen months later, following conferences and promises by the owner to remove the addition, at the time of the fire it was essentially still undisturbed on its original foundation. In the meantime, as stated by the court, with full knowledge of all the circumstances, the agent of the company had insured the property, discussed what was being done with the owner and ad-

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vised her not to tear it down and not to worry about the matter. The court said:

My conclusions are that the judgment and orders of the court, and the plaintiff's promises respecting the character of the "addition" and its removal, did not change the plaintiff's interest in, title to, or possession of the structure, so long as it remained undisturbed upon her premises, and attached, as it originally was, to the main building, and, moreover, that the defendant is bound by the knowledge of its agents respecting the character and results of the litigation concerning the said "addition," and, having issued the policy with such knowledge, cannot now deny its liability on that account.

This decision appears to have been mainly based on the knowledge of and waiver by the company through its agent. *Tieman et al. v. Citizens Insurance Co.* (78 N. Y. Supp. 620) has also been referred to as showing that the New York courts do not endorse the theory of indemnity as do those of other states, and apparently with some reason, for the court said (Ingraham, J.):

The fact that the plaintiffs' property was damaged by a risk within the terms of the policy was at the time of the fire a direct damage to the plaintiffs, which the defendant had insured. The fact that the plaintiffs had offered to sell the property at the price which they subsequently obtained, notwithstanding the impairment of its value by the fire, would not release the defendant from liability; and I cannot see that the execution of this contract would have that effect. I think, therefore, that when these buildings were damaged the express terms of the policy applied, and by it the insurance company became liable to the plaintiffs to the amount that the buildings were damaged, irrespective of the subsequent disposition that they were able to make of the damaged buildings.

Whether, had it been shown that the very contract pending at the time of the fire had been carried out unaltered and unaffected, the court's views might have been less decided, can only be left to speculation. The court, as constituted in 1902, might have been likely to hold that: "Money loss is not the true measure of the indemnity under the contract; that the test should be, Did the property the subject matter of the contract suffer diminution in value by the happening of the hazard insured against?" However, it is scarcely to be believed that the New York Court of Appeals will fail to uphold the sound rule of "indemnity only," so sweepingly adopted by other courts, when cases are presented in which the issue is squarely raised. The signs of the times are that our courts are giving ear to the criticism of many of our leading jurists and public opinion that mere technicalities should be set aside in favor of substantial justice and public policy.

CLEMENT, FIRE INSURANCE AS A VALID CONTRACT, I, 17.
MAY ON INSURANCE, I, 1, 11.

COOLEY, BRIEFS ON THE LAW OF INSURANCE, I, 85-97.

RICHARDS ON INSURANCE LAW, 27, 72.

OSTRANDER, LAW OF FIRE INSURANCE, 356.

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- DEMING v. MERCHANTS COTTON PRESS,
90 Tenn. 306, 347.
- CARPENTER v. PROV. WASH. INSURANCE CO.,
16 Pet. 495.
- EAGER v. ATLAS INSURANCE CO.,
14 Pick (Mass.) 141, 146.
- CUMMINGS v. INSURANCE CO.,
55 N. H. 458.
- IMPERIAL FIRE INSURANCE CO. v. COOS COUNTY,
151 U. S. 452.
- ILLINOIS MUTUAL INSURANCE CO. v. HOFFMAN,
31 Ill. App. 295, 132 Ill. 522.
- MURDOCK v. CHENANGO COUNTY MUT.,
2 N. Y. 210.
- CROSS v. NATIONAL FIRE,
132 N. Y. 133.
- BORDEN v. HINGHAM MUT.,
18 Pick (Mass.) 523.
- CASTELLAIN v. PRESTON,
11 Q. B. Div. 380.
- CHICAGO, ETC., R. CO. v. PULLMAN CAR CO.,
139 U. S. 79, 88.
- NICOLET v. INSURANCE CO.,
3 La. 366.
- HOFFMAN v. WESTERN MARINE & FIRE,
1 La. Ann. 216.
- ILLINOIS MUTUAL v. ANDES INSURANCE CO.,
67 Ill. 362.
- DRAPER v. DELAWARE STATE GRANGE MUTUAL,
91 Atl. 206.

Cooley's Briefs on Insurance (I-78) says: "Whatever analogies may be discovered between the contract of insurance and other kinds of contracts, there are certain fundamental characteristics of the insurance contract that must be taken into consideration in order to understand the distinctions and qualifications observed in the application of the general rules of law to its interpretation."

The contract of insurance is a voluntary contract, in which the insurers have a right to incorporate conditions, and such conditions will be binding on the insured in the absence of an objection. (Keim v. Home Mutual F. & M. 42 Mo. 38, 97 Am. Dec. 291) (Rann, et al, Exrs. v. Home Ins. Co., C. A., N. Y., I. L. J., V-15). If the insured objects to any condition in the policy, he is under no obligation to make the contract; but if he voluntarily enters into it he will be bound thereby.

The contract of insurance is a conditional contract in that it indemnifies the insured only in case the loss does not occur from an excepted case, and it insures the property only while located and contained as described in the policy.

- TYLER v. AETNA FIRE,
2 Wend. (N. Y.) 280.
- JONES v. INS. CO. NORTH AMERICA,
90 Tenn. 604; 18 S. W. 260.
- COOLEIDGE v. CONTINENTAL INSURANCE CO.,
67 Vt. 14; 30 Atl. 798.

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Fire insurance being then a promise of indemnity under certain conditions named in the contract written by the insurer and voluntarily accepted by the insured, the insurer and his adjuster must have in mind that the courts have properly held, as a matter not only of law, but of equity, that any ambiguities in the contract must be construed in favor of the insured, on the theory that its wording is that of the insurer, who is presumed to have accepted any liability the contract can consistently be construed to cover. The claim of contrary intent will not ordinarily be considered or allowed to override the written provisions of a contract.

There should be no argument possible, after a fire has occurred, as to the exact cover of a policy. Its statement that it does insure in accordance with the written policy form, should admit no doubt as to its intent in the minds of the insurer and insured alike. The time for the careful wording of its cover is when the liability is accepted. The needs of the insured should be particularly inquired into and the contract given him should be plainly and explicitly worded, admitting of no ambiguity, and leaving no room for discussion after the fire. Much of the acrimony in adjustments and the charges made against insurance companies of unfairness and alleged desire to cancel their liabilities as cheaply as possible, regardless of justice to their clients, have arisen from carelessly worded policy forms.

It should not be left to the liberality or discretion of the insurance company, or for it to be influenced by the value of the customer's business, whether, after a fire, the policy on "building and permanent fixtures" covers the seating fixtures of a hall or theater, which are merely fastened to the floor by screws and therefore removable without material defacement of the building; whether customs duties are insured in a policy covering on goods in bond; whether customers' property in the hands of a tailor or furrier and the value of the labor he has expended on them are covered; whether tenant's improvements are to be covered under a building policy in whole or in part. The proper wording of policies in such cases as the last mentioned can only be determined after a careful reading of the existing leases as to their provisions in reference to cancellation on the occurrence of a fire, for removal of the improvements, and as to reversion to the building owner. A permit in a policy for a chattel mortgage does not contemplate the existence of more than one mortgage. Many other illustrations of the point I wish to emphasize might easily be given.

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Both insured and insurer are often at fault. The blame will, however, be usually placed on the insurer, and properly, because he is presumed to be familiar with the requirements of his business, the necessity for exact information, and to be expert in the proper wording of his contracts.

Insurance has been called "the handmaid of commerce." How important it is has just now been so thoroughly demonstrated that our national government has been obliged to undertake one branch of it, at least temporarily. It can only be faintly imagined what would be the result if fire insurance should become no longer obtainable, but how many men daily file away insurance policies, which in case of fire should be worth thousands of dollars to them, without taking the trouble to look at more than their filing backs, certainly without reading carefully the policy forms.

It should be the aim of the insurer to impress upon his clients that fire insurance is neither a mystery nor something which cannot be understood by the "plain people;" not a scheme for the fattening of the stockholders nor a "get-rich-quick" scheme for the initiated few; and that it can as readily be understood by the average business man as his own business, if he will only give it the attention its importance to him warrants if he has a fire.

Losses should be adjusted from the same standpoint as that of any good citizen and honest man endeavoring to carry out his business engagements, bearing in mind his rights and also his responsibilities, remembering that his intent will be judged more by his actions than by his words. (Clement, *Fire Insurance as a Valid Contract*, pp. 454, 456.)

Honest claimants are entitled to prompt attention and the most courteous treatment even if their claims are exaggerated. They should be argued with and shown their errors and mistaken judgment as to their loss.

If the adjuster can impress a claimant with the belief that the adjuster is well informed, fair-minded and sincerely desirous of arriving at a settlement which will fully discharge the whole obligation of the company to the insured, he can insist upon the company's rights, limit the settlement to the liability contracted for under the policy, retain the respect and confidence of the claimant and make a good friend for his company. He cannot expect to convince the claimant of the justness of his view unless he has first honestly convinced himself.

Fire insurance is a plain, straightforward business in which the

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margins of profits are small, considering the risk involved. The private and business morals of the men engaged in it as insurers and adjusters will compare favorably with those of men in any profession or line of trade.

I believe that our business with our clients and claimants is conducted as to give daily evidence of this fact.

XVI

THE CHIEF FACTOR IN FIRE LOSS ADJUSTMENTS

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I do not hope to be able, and indeed shall not try, to tell my hearers anything very new here. But by reminding them of some things they already know, and have always known, but do not always remember, I may be able to help them extract from things familiar a profit that even novelties would not yield.

Furthermore, I shall have to admit in the outset that the element which I have chosen to designate as the chief factor in loss adjustments, and to discuss under that head, is not strictly and literally the chief factor at all. For the losses themselves are the real chief factor in adjustments. As the cards beat all the players in whist, so the losses in the long run outweigh all the human elements in loss adjustments. The contract and its construction, the parties, principal and subordinate, precedents and processes, men and methods, are all more or less helpless before the brute might of the loss itself. Facts are stubborn things, and among underwriting facts the stubbornest of all are losses. But their very stubbornness disqualifies them as subjects of study. As a treatise on whist which should discuss only the various possible results of the deal, without telling how to play the hands, would be a mere exercise in permutations, so the Chronicle Fire Tables, though of great statistical value, are not well suited to the needs of an evening club of insurance students. In one case as in the other, it is the human and controllable elements of the game, the personal and voluntary factors of the problem, that are likely to interest and profit the learner. And from this point of view, which must be the point of view of the company manager seeking to better his company's position, as well as of the company employe seeking to fit himself for the work of adjusting losses, the chief factor in a loss adjustment, or rather what we may call the greatest common factor in all loss adjustments, is unquestionably the personal quality of the adjuster.

In this chapter, therefore, I mean to say very little about losses and loss adjustments,—as little, that is, as one can say, once he has begun talking at all, on a subject which has been the chief staple of his conversation for nearly twenty years,—and to devote my time, and invite your attention, to adjusters instead; or rather, to the

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adjuster, considered in the abstract. Moreover, I mean to touch but lightly on those elements in the personal equipment of the adjuster which are due to his special training in the details of his work, and to confine myself chiefly to those elements due either to natural endowment or general culture, and especially the latter. For it is the general character and culture of the adjuster as a man, not his special training and experience as an adjuster,—his quality and not his qualifications,—that constitutes the chief human factor in loss adjustments.

Let me dwell on this point a little at the outset, for it is the core of my sermon. I concede without reserve that the young adjuster must be taught the theory and practice of his profession, and in a more systematic and painstaking manner than most of us now in the business were in fact taught in our time. For I reject the doctrine that every ex-agent, ex-solicitor, ex-broker, ex-counteraman, or even ex-manager, is fitted by his previous connection with the insurance business to adjust losses, without previous training in that branch of the business, just as I reject the doctrine that everybody who has failed in some other business is *ipso facto* qualified for the insurance business. There are a good many things to be learned—both general principles and specific facts—before one can become an adjuster. But no one can learn them profitably; that is, no man by learning them can become a good adjuster, unless his general character, culture and judgment have been very considerably developed before he began these special studies.

The old adage says you cannot make a whistle out of a pig's tail. I believe one smart Yankee undertook to falsify that saying, and did in fact exhibit just that kind of a musical instrument at the Centennial Exhibition in 1876. But in the quarter of a century that has since elapsed there appears to have been no demand for the product of that misguided industry, and the adage has lost little of its lustre because of this solitary attempt to belie it. In the same way it remains true that you cannot make a good adjuster out of a young man whose native character and general culture are inferior, despite the number of instances in which the experiment has been hopefully tried. For in this, as indeed in every other art and profession, it is indispensable that specific training should be underlaid by intelligence and preceded by culture.

A lady of my acquaintance, herself a gifted and greatly admired public reader, was once asked, as a favor to a personal friend, to give the latter's young daughter lessons in expression and voice

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culture. She tried the girl a few times, then declined to go further with the experiment. To one—not the girl's mother—who inquired why, she said, "Lucy has a pleasing and flexible voice, charming manners and presence, and some knowledge of elocution. But all high grade instruction would be wasted on her, because she simply lacks the central intelligence without which no art can be either mastered or made worth while." By the same token it is impossible—and here I speak in accents of anguish and out of the fullness of bitter experience—it is absolutely impossible for any business college or any office training to make a good stenographer and typewriter operator out of a girl who has not a quick intelligence and a real and intimate acquaintance with good English to start with.

These are but illustrations of a truth of which all professions and arts and occupations furnish abundant examples. And there is scarcely any other calling known under heaven and among men where personal force, general character, tact, adaptability and bearing so far outweigh specific knowledge and experience as elements of success as in the adjusting of fire losses.

I am aware that the uninitiated sometimes suppose an adjuster to be stuffed full of special knowledges of all kinds, covering the materials and the processes, the customs and the prices peculiar to all the mercantile and manufacturing businesses of the country. But that is some way off the truth. Experience does indeed acquaint an adjuster, in a general way, with a good many other men's business, and he cannot but pick up, whether he retains it or not, much miscellaneous information from all sources. But that is far from saying that he becomes a master of the special knowledge of the life-long followers of the various pursuits he successively "takes a flyer" in. The adjuster is a sciolist, not a specialist. I do not suppose there is an adjuster in New York who is a genuine up-to-date expert in any single mercantile or manufacturing business, much less in forty or fifty of them. And, after all, it is not expert knowledge that chiefly counts, but the general experience and judgment that enable the adjuster quickly to pick up and use such specific knowledge as the case requires. Every new adjustment must be treated as an opportunity for learning something new, or correcting and bringing down to date some previously acquired knowledge, rather than as an invitation to display the perfect wisdom begotten of by-gone losses. In the main, it is better for an adjuster to be teachable than wise.

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I remember—and here already I find myself departing from my resolve not to tell stories about particular loss adjustments—I remember a certain window-glass factory adjustment at Bellaire, Ohio, some fifteen years ago, in the course of which rather more than the usual insight into manufacturers' secrets of cost of production, etc., was necessarily obtained by the adjusters engaged. (Perhaps one thing that helps me to recall this particular adjustment so clearly, after all these years, is the fact that I had inspected and approved the risk three hours before it burned). The secretary and manager of the works was a hard-headed German with whom other people's beliefs and arguments didn't "go." Having compiled his estimate of the quantities and values of glass, in cylinders, sheets and lights, packed and unpacked, in the various portions of the burned works, he would neither discuss nor defend his figures. There they were, and there he was. It mattered nothing that the quantities were impossible and the prices absurd, in the light of the experience of every other glass-house in the "Glass City." Remonstrance, appeal, mathematical demonstration,—none of these things moved him. They cut no ice and no glass. We showed him by his own books how far wrong he was, and satisfied his own stockholders that our criticisms were just. All would not do. So we had an appraisal by two of his neighbors in the business, and got an award that more than sustained our contention. The adjustment was full of difficulties and punctuated with Teutonic grunts and objurgations. It had taken a week—a week of the steady and unremitting attention that only field men ever give to losses, and that most metropolitan adjusters know nothing about. I was very tired when it was over, but had a "grip" full of useful figures, and a whole lot of ready-to-serve information about glass making. I knew what went into the "batch" and what came out of it, the cost and proportions of the ingredients, the rate of wear, capacity, and cost of the melting pots, the blowers', cutters', and packers' wages, the functions of the lear and the flattening oven, the difference between single and double strength, at what point a "box" ceased to mean 100 sq. ft. and began to mean 50 sq. ft. instead, and all manner of similar wisdom.

Though young in the business of adjusting losses, I had already begun to discover there were many things I didn't know. But I certainly did think, after that Bellaire adjustment was over, that at least I knew the window-glass business. Accordingly when, some months later, I got notice of another similar loss, up in the newly developed natural gas field of Findlay, I said to myself, as I put

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my Bellaire memoranda in my grip again, "Well, if window-glass losses must come, they may as well come to me as to any one. I can take care of 'em if anybody can. And those young fellows up at Findlay, who are said to be new to the business, will certainly begin to sit up and take notice before I get through telling them what I know about glass making." In which spirit I boarded the cars for Findlay. It happened that on the train I fell in with an old field man to whom I told my destination and mission, and he remarked casually that he supposed the advantages the Findlay glass-makers enjoyed in the way of free fuel, free land, and bonuses, would have resulted, at least temporarily, in a very low cost of production. The idea was new to me. I didn't say so, however, but a wholesome pensiveness fell on me, and by the time I reached Findlay I was prepared to act the part of the intelligent listener, rather than that of the eloquent orator. And it proved well for my company that I had fallen on this lucid interval. My Findlay claimants were not old manufacturers, it is true, but their superintendent was, and for their part they were excellent men of business and good accountants; and they soon showed me that it was costing them to make window-glass that year in Findlay about seventy-five per cent (I think it was) of the figures I had so laboriously compiled at Bellaire the year before.

This fable, it seems to me, teaches three things: first, that those who have just newly moved into glass houses shouldn't begin throwing stones till they have gained a residence; second, that in an adjustment the claimant should be given the white pieces and the first move; and third, that a sprig of perennial good sense is often more useful than a hay-wagon load of information harvested last season. Upon examination I observe that all three of these morals are the same, but they are probably none the worse for that. At any rate the experience itself was a very useful one, because of the way it emphasized the great truth that specific knowledge must always play second fiddle to general judgment in an adjuster's talents. And every year that has passed since then has only added to the force of this teaching.

No sort of knowledge is likely to be wholly useless to an adjuster, and happy he who can acquire, retain, and command for instant use a wide range of facts bearing on the businesses and materials he must deal with. But the facts themselves must always, in the long run, be subordinate to the capacity to use them aright. And that capacity comes by other roads than the facts it must employ. In part, of course, it is nature's own gift, and implies no other merit

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in its possessor than a wise choice of ancestry. And with that portion of an adjuster's training which begins three generations before he is born we cannot profitably occupy ourselves further than to note and choose among its results. But while integrity, quick intelligence, self-control, resourcefulness, a keen sense of justice, courtesy and tact are in great measure native endowments, there is no one of these great and eminently practical virtues but may be developed and amplified from comparatively small original stocks of the raw material. And, whether by inheritance or by development, they and other similar qualities must be acquired before an adjuster can be made, or be ready for the making; that is, before any special training in his business can profitably be given him.

Perhaps, after all, I cannot give this general proposition, that what an adjuster is is more important than what he knows, its proper weight and significance in any way better than by giving you some idea of what I think he ought to know. For I am as far as possible from believing that his special knowledge is unimportant in itself, merely because I believe it relatively less important than his general character.

An adjuster then, should know the insurance contract thoroughly, its printed conditions and the commoner varieties of its written or attached forms, clauses, riders, restrictions, permits, etc. He should even have some acquaintance with the historical development of the several features of a modern policy, with their earlier forms and the legal, commercial and practical reasons that have led to their modification. His knowledge of the contract should cover both the natural meaning of its terms, and the various constructions placed upon them by the courts. He need not—he ought not—be a lawyer, but his acquaintance with insurance law should be so good that no lawyer's opinion on any point of purely insurance law will have any weight with him unless accompanied by the reasoning or the precedents on which it rests. He should have a general acquaintance with commercial book-keeping,—a particular and expert knowledge would be better still. He should be able to estimate the cost of a plain brick or frame building, both generally and in detail, and have a similar acquaintance with prices of the commoner kinds of destructible property,—household furniture, wearing apparel, belting, common machinery, and stocks of merchandise. He should have an extensive general knowledge—a special knowledge he cannot have—of the staple articles of commerce, considered both from the underwriter's and the adjuster's point of view. His knowledge of

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manufacturing processes should be on a par with his knowledge of trade commodities. And especially he should know where to seek the information he himself does not possess on any or all of these subjects,—the men, the books, the places that can tell him what he needs to know.

Now, it will be admitted that this sketch, brief as it is, calls for an assortment of qualifications by no means easy to acquire. It is distinctly a large contract so to fit for the work of adjusting losses any young man, no difference what his native ability, that he will fill the requirements here indicated. It is probably no slander to say that a good many of the fifty or sixty men now adjusting losses in New York City do not fairly measure up to this standard of special training and equipment. But I still affirm that a man might exemplify fully the several kinds of knowledge embraced in this catalogue and still be much less than half of a good adjuster; and, conversely, that he might be to all intents and purposes a very good adjuster indeed, and yet be deficient in several or many of these important requirements. For, all together, they neither constitute, nor compare in importance with, that part of an adjuster's equipment which I have chosen to call the chief factor in loss adjustments.

To revert to the division adopted at the outset, every professional or business man may be viewed as divided, like Caesar's Gaul, into three parts: natural character, general culture, and specific training. For the purposes of this paper, I am passing very lightly over the last of these three elements in the equipment of an adjuster, important as I have just declared it to be. And in like manner, I mean to say but little about the first of them. For tremendous as is the importance, not only in loss adjustments, but in all other human enterprises, of purely natural endowments, it is of little use to discuss them before an audience composed chiefly of employees rather than employers. It might profit a roomful of company managers to have pointed out to them the native qualities of mind and person they should seek for in their adjusters. But men still young, and looking forward to shaping their own careers in the insurance business, will care more to know how, with the natural gifts they already have, they may best prepare themselves for the work of adjusting losses. Moreover, I have the perfectly definite conviction that the weak spot in the armor of the average adjuster is to be sought, not in what he was by nature and inheritance, before he learned anything, nor in the specific training he has received as an adjuster, but in that intermediate region of the general education he received, or

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gave himself, before his specific training began. In other words, it is neither in character nor in technical education that an adjuster is so likely to be deficient as in general culture. And this deficiency is, I am bound to say, likely to be more apparent in a city like New York than anywhere else. It is a commonplace of observation that, not only in the insurance business but in every other business and profession, notably the law, outsiders from all parts of the country win an undue proportion of the chief prizes in competition with native New Yorkers. Of course one reason is that a great city attracts the stronger, more daring and more resourceful spirits from the professional and mercantile ranks in all the smaller towns and cities, and that therefore the outside contingent is of greater average strength of fibre than the unselected home talent. But I am well satisfied that in the insurance business, at least, a man usually has a better chance of fitting himself to take high rank, whose years of preparation are passed in a smaller place, than another of precisely equal natural gifts who spends the same years in New York City. There are, it seems to me, two chief reasons for this. The first is that where the work of a business or profession is so highly specialized and subdivided as it must be in the great offices and establishments of a large city, a young man has many chances of spending his life at one desk or in one department of work, and comparatively few chances of getting such a wide outlook over his chosen calling as a whole that he will be in line for promotion to any really first-rate post. It is otherwise, of course, in the smaller place, where a youth soon gets a "try-out" at every branch of the business, and so a chance to learn general principles and fit himself for advancement toward the top. The young man who in New York might spend years in writing policies or keeping one record-book, would in the country be displaying his all-around ability, and gaining both self-confidence and the notice of his superiors, in six months' time. But the other reason is still more potent. In New York the office help is composed of clerks who have left school, on the average, two or three years earlier than they would have left it had their youth been passed in a smaller place. The tremendous attraction, the pull, that business life exerts on the youth of a great city, is quite without a parallel elsewhere, and this fact is full of danger to the community as well as to the individual. The most stunning piece of educational statistics within my knowledge is the fact that until six years ago New York City proper—Manhattan—did not have a single High School in its educational system. And that fact is typical of the

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whole attitude of the city toward the preparation of its young men for their life work. Nothing like the same proportion of New York City boys, either of wealthy, moderately well-to-do, or poor families, get, or seek, or are expected to take, a high-school, or preparatory school, or college course, as of boys of the corresponding grades of society in the smaller cities and towns of New England, or rural New York, or Pennsylvania, or the Middle West or North-West. Business colleges in abundance we have here, some of them excellent of their kind, some wretched beyond the power of words to describe, but all of them quite inadequate to supply the general training that most of their pupils chiefly need. But the typical preparation for business of New York boys, even of intelligent and well-to-do families, is not that of even the business college, but of actual employment in an office or shop or store from the age of sixteen or younger. And one conspicuous and inevitable result is the immense mass of clerical ability of the cheapest grade, that gluts the New York market, keeps salaries absurdly low, and furnishes only an insignificant percentage of promotions to the ranks of upper class business men. For contact with the world in early youth, while it brightens and sharpens and hardens, does not really educate, once in five hundred times. Occasionally a strong, or even a fine, spirit makes its way to honor and power from the ranks of the newsboys or the bootblacks. But in the main those schools graduate their pupils into careers of crime and wretchedness. Sometimes a man whom chance or necessity has driven into business in early boyhood has made of himself, despite the lack of schools or teachers or leisure, that delightful and unmistakable product, a cultivated gentleman. We all know and honor a few such, I trust. But, for one such example, there are always hundreds of the kind in whom an average, or perhaps more than an average natural ability has been practically deprived of all chance of achieving a worthy development by the premature substitution of an office for a school-room as a sphere of activity. If every young man who has chosen, or been compelled, to go into business several years before his schooling ought to have ended, could fairly appreciate what it is he has missed thereby, and then set to work to make good the loss as far as lies in his power, the number of individual successes, in life and in business, would be greatly increased. Many a man has gained for himself a great part of the benefits that a high school and college course ought to yield, without in fact going to school at all; but most men do not and never will accomplish any such achievement, because they have no proper conception either of

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its value or its practicability. For example, an acquaintance, and a very considerable acquaintance, with history, and with the best literature of all languages, is possible to almost every man. And such an acquaintance is of permanent, various and purely practical value to every man who has it, in ways and to a degree that words cannot overstate. But the bright boy who goes into business from the grammar school is only too likely never to have had that fact properly impressed upon him before, and not to have a reasonable chance of having it impressed upon him after his business career begins. Abraham Lincoln and Andrew Carnegie, and many another beside, may indeed have abundantly made good the defects of their formal education, and grown up into a ripeness of wisdom, a keenness of intelligence, and a saneness of judgment that are rare among men of any age or country. But, after all, it is only the rare spirit who can perform any such miracle. And it is a tremendous handicap that is imposed on the ordinary boy who is plunged into steady, exacting routine work—drudgery, if you please to call it so—before his judgment, his will, his tastes and his ambitions have ever begun to turn him toward self-culture and the intellectual life. All honor to those who overcome that handicap and, by becoming and remaining forever greater than their work, both magnify it and enrich their own lives.

But whether this personal culture be chiefly derived, in the normal way, from a thoroughly good general education, or acquired by the individual, through superior insight and determination, in spite of the almost total lack of educational facilities, in the ordinary sense, the point I make is that without it no considerable success is possible in any profession or in any high-grade business or occupation. And, in particular, the business of adjusting losses, it seems to me, demands, even more than it demands great natural ability or superior technical training, this general culture and all around development of character and intelligence.

For consider a few of the prime requisites in an adjuster's equipment, taken merely as examples, and almost at haphazard, and see how largely they must proceed from such a general culture if they are to be found at all. Take first the virtue of flexibility—the power of adapting or attuning one's self to the mental quality of the man one is dealing with. An adjuster must be able, first of all, to draw out his claimant, to get in touch with him, to gain his confidence and his respect. He must deal with the Doctor of Divinity or the Fifth Avenue swell, or the great merchant or manufacturer,

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without seeming to look up, and with the bartender or the East Side "kyke" without seeming to look down: meeting every man as nearly as possible at his own level, and doing business with him on terms of equality, so far as either party's consciousness can, at the time, record.

Of the immense value of this kind of adaptability there cannot be two opinions. And while an occasional finely tempered soul may be born with it in his kit, in the main it comes only with much knowledge, both of books and of men—of life and of history. President Roosevelt, whose comradeship with cowboys and with kings is equally easy and unconstrained, is a type of the character made flexible by cultivation, and, because flexible, potent beyond the possibilities of the narrow or commonplace mind. Another example of personal flexibility occurs to me often, and I digress to tell a story for the sake of it.

Some eighteen years ago I went from Cincinnati to adjust the loss of the Tabard Inn and its contents, in the curious and interesting English colony at Rugby, Tennessee, then largely under the control of the late Thomas Hughes. It was a lonely region on the Cumberland plateau, and the colony contained some of the most attractive and delightful people I have ever seen brought together. A few of them were from New England and other parts of the North, but for the most part they were English,—English of the Seven Seas, however, for they had come from India, Australia, and the Straits Settlements, as well as from the British Isles. Among them still dwelt many of the native mountaineers of the region, the real Carolina-Tennessee breed that Miss Murfree and her successors have tried to make us see through a kind of pink halo of fiction. One day, at the post-office in the village store, my host, the Superintendent of the Colony, introduced me to Uncle Henry Plotner, a typical native, but a very shrewd and original old man, a bit of a philosopher and a most entertaining companion. Uncle Henry took kindly to me, because, as it seemed, he was glad to meet a stranger who came from no farther away than Cincinnati, instead of hailing from Berwick or Calcutta or Melbourne; and he told me many stories of the colonists' experiments in agriculture and kindred arts that seemed to him, and sometimes to me, pretty funny. He evidently had but a poor opinion of the practical good sense of his new neighbors, whom he looked on as mainly a set of harmless but improvident lunatics. But he made one exception or reservation. "Wilson, the surveyor," he said, "is all right; just a plain, ordinary

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fellow like you or me, and got as much sense as either of us." A day or two later I went to call on Wilson. He kept bachelor's quarters in a one-room cottage he had built in the forest on the edge of the village. A fresh-faced, powerful, but rather clumsy young Englishman he was, in soiled duck trousers and a shapeless jacket. One side of his one room was covered with empty beer-bottles, on shelves, to the ceiling. With that dogged patience that can only be called British, he had sampled about all the brews of beer and ale the United States could boast of, sending to New Orleans, St. Louis, Cincinnati, Milwaukee, and even Harrisburg and New York for the goods; and while he hadn't yet found just the thing he liked, he was rather proud of his collection of bottles, just as it stood, and still hopeful of one day coming on a really good beer somewhere. On the opposite side of the room were some surveying instruments, some chemical supplies and apparatus, and a small but striking collection of books. The young man's conversation was unaffected, and his bearing quite what Uncle Henry had described it. But it was clear he was a "thoroughbred," all the same, and I made early inquiries from the Superintendent. Wilson proved to be a Cambridge Senior Wrangler, brother of Dr. Wilson, a famous head-master of Clifton College in England, born and bred in a family of scholars, himself one of its brightest lights. He was far and away the most learned man in the little colony, perhaps in all Tennessee. And yet he was the one man in the settlement whom Uncle Henry could commune with as with an equal and familiar. He died of typhoid fever a year or two later, I believe, and his career never fairly began. But I never think of him without wishing that the business of adjusting losses could be made more attractive to the type of man he represented.

Next to flexibility I incline to rank modesty; by which I mean, not the lack of self-conceit, but the ability to prevent one's self-conceit from becoming offensive to the man one is dealing with, and so a serious obstacle to the conduct of business. I sympathize with the philosopher who concluded that all men have about equal endowments of self-conceit, the difference among them being only in their display of it to the world. Indeed, the reason why my self-conceit offends my neighbor is largely because it comes in contact with his own more or less protuberant bump of the same quality. But if it does offend, and if I have reason to wish to avoid giving offense, then I were wise to exercise control in that respect. In an adjuster, moreover, the danger of a conceited bearing lies not merely in the risk

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of arousing resentment and hostility, but in its tendency to dull his own perception of the feelings and purposes of those he is treating with. For no one who is chiefly concerned with his own ideas and their expression can be properly alive to what is going on in the mind of the other party to the conversation. And there is absolutely no more urgent necessity than this in adjustments,—that the adjuster should quickly and constantly gauge his claimant's state of mind and feeling. So that nothing is more certain than that a manifestly conceited adjuster is a menace to his company's welfare, unless it be the other fact that manifest conceit is almost always a product of an imperfect education or general culture. A little freshly-gained knowledge is of course a fertile begetter of conceit, particularly if it be some very narrow and special kind of knowledge. But wisdom is the parent of modesty. A new-fledged country school-teacher, who begins to suspect himself of being a lightning calculator or a born speller, jars the township with his tread. But Presidents Eliot and Hadley step softly when they cross the campus.

Again, an adjuster should have a thoroughly good command of language. Of course he must be able to state an argument clearly, draw an agreement correctly, and frame a report intelligibly. But that is not all. If he is to do business with all sorts and conditions of men, and if, as we have insisted he must, he is to meet every man at his own level, he must speak to every one, as far as possible, in his own tongue,—that is to say, employing the vocabulary, the style, and the illustrations that each of them best understands. Here again natural gifts count for much, but in the main it is a thorough culture, a real knowledge of life and literature, that is the determining factor. No young fellow who has merely grafted upon the slipshod speech of the street a few commercial and technical phrases from the office or the shop, and decorated the result with snatches of rhetoric borrowed from Chimmie Fadden or Weber & Fields, or the New York Sun's joke column, has fairly begun to equip himself for adjusting losses through the medium of the English language; though no one of the sources of speech here named is in itself to be despised. Good sense and a right understanding of the point at issue do go far to enable a man to express himself with sufficient clearness about all kinds of routine matters. And a clerk or office man, not entrusted with important correspondence, does not need "the tongues of men and of angels" in his business. But an adjuster must carry his merchandise of speech to all kinds of markets, and must be sure it will be welcome and merchantable in them all. Now merchantable cer-

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tainly does not mean formed for display, but it does mean suited to the local demand, conforming to the local standards. And only the man of considerable natural gifts or the man of considerable education can be sure of habitually saying the right thing in the right way and to the right hearer.

I pass over such qualities as thoroughness, self-control, courtesy—all indispensable to an adjuster and all dependent in great measure upon his general nurture rather than his native endowments or his business training, just as I am passing over the fundamental virtues of integrity and a strong desire to do justice—which latter are usually rather nature's gifts than the products of any sort of culture.

And I come to what is perhaps one of the most important of the intellectual (as distinguished from the purely moral) qualities of a good adjuster—resourcefulness,—the quality of being equal to any previously unexperienced conditions and emergencies. There are few men, I fancy, to whom the unexpected happens oftener than to the adjuster. Many incidents of his career are of course entirely commonplace, orthodox, capable of being foreseen, and in fact carefully provided for by his training and experience. But a very large number are of the other sort altogether. Losses themselves, the conduct of claimants and their employees, the handling of accounts and other evidences of values, salvage operations, the problems of policy construction and apportionment are all likely to develop surprises for the most experienced of adjusters, and to test his general fitness for his job in sudden and excruciating ways. Sometimes it is specific expert knowledge that is thus called for at a moment's notice, but more often it is that familiarity with general principles, and that power of applying them to new conditions, that we call general ability. The man who has not this quality will never in the world be a great adjuster. And this habit or practice of correct reasoning and of prompt action upon the results of such reasoning is the product of nothing so much as of general culture and all-around mental development. Books and the school room alone will not give it, to be sure, but they can greatly increase the probability that a man will acquire it for himself. For training begets power, and power does the world's work.

A little story that comes to my mind in this connection happens to be a special agent's rather than an adjuster's story, but it will illustrate my point well enough. An old friend from the Cen-

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tral West called upon me a few weeks ago to report progress since we met last. He is still a young man, but is at the head of a very important field department for one of the largest insurance companies in the country, and with every prospect of a distinguished career. Ten years ago, when he had just left the local office where he got his start and gone on the road for an English company, he was sent to, let us say, Brownsville, Indiana, to collect a balance and transfer an agency. He found the delinquent agent to be a rising young lawyer in the county town, probably honest enough, but wholly without financial strength, and just then engaged in a hot campaign for election as Prosecuting Attorney of the county,—a campaign that was imperatively demanding all the ready money he and his friends could spare. The aspiring young candidate explained to Wright, the special agent, that it was quite impossible to pay that little balance at once, but that the election would be over in about a month, and he was absolutely sure to be in office and in funds in a very short time. Wright, who felt himself too new to his job to tamper with imperative instructions, threatened suit. But the lawyer-agent only laughed at that. The balance would be paid, he explained, before judgment and execution could possibly be had, and the legal expenses would be quite wasted. Pay he surely would, and that before long, but pay now he could not, nor could anybody make him. Well, Wright went on with his preparations for the transfer, selected a new agent and turned over the supplies to him, then spent a few minutes in meditation, and a few more in making certain inquiries from local sources. Next day he called on his ex-agent and explained that he was unable to remain longer in town, and that he felt it necessary under his instructions to put his Company's claim for that balance in the hands of a lawyer, in spite of the probable futility of such a course. That was all right, the delinquent said; instructions ought to be obeyed, he supposed, but in any event no lawyer would be able, and he was pretty sure none would try, under the circumstances, to collect the money before he was ready to pay it. With whom did he mean to leave the claim? Wright referred to a slip of paper and said he had been advised to employ Mr. Tom Jackson. The other's jaw dropped as if paralyzed. "Oh—well—why—say, for God's sake don't do that! Why he's my opponent in this campaign!" "Is he?" said Wright, as if the idea were new to him. "Yes," said the agent, "and he'd just tear this county wide open if he had a thing like that against me. He couldn't get the money, and he wouldn't try very hard.

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But he'd beat me out of my election, sure as shooting!" "Well," replied Wright, soothingly, "if that is so, it seems to me you have a mighty easy way of making sure of your election." The frightened candidate looked hard at him for a moment, then said, desperately, "Say, wait till the afternoon train." Then he went out on the street and borrowed the amount of that little balance in five and ten dollar sums, much of it in silver, visiting all his party friends among the office-holders, merchants, and saloon-keepers of the place, and coming back flushed and perspiring, but immensely relieved. Wright took the afternoon train, and his company never knew how the money was raised. But he didn't have to keep track of the result of that election, because it had ceased to interest him. Now, that particular trick had probably never been "turned" before by anybody, and an inexperienced young special agent who could hit upon it, and make it "go," must have had, as his subsequent career attests he did have, internal resources of an unusual kind. And the demand for just that kind of first-aid-to-the-injured mental equipment is of frequent if not constant occurrence in the adjustment of losses. And it is a demand that no man can respond to habitually unless, in addition to good natural qualifications and good training in his business, he has the general preparation that is a training for all business.

I need not further multiply qualifications nor examples of their usefulness. You may take my word for it that the chief human factor in loss adjustments is the personal force and quality of the adjuster; and that the business is one which, while it is perforce too often left in other hands, really calls for the services of a set of all-around intellectual athletes.

If the Insurance Society should succeed in developing more of that kind of material than the Loss Departments can absorb, it is an absolute certainty that the other branches of the insurance business will gladly take up the surplus.

XVII
THE CLAIM—THE PROOF OF LOSS—WHEN IS
LOSS PAYABLE?

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Until the conviction in the so-called Markheim case, later affirmed by the Court of Appeals, there had been much doubt as to what constituted a claim against an insurance company for the payment of a loss upon a contract of insurance. Louis Markheim, president of the Markheim Company, a corporation, was convicted after a trial lasting several days, held before Mr. Justice Gavegan, of the Supreme Court, and a jury, and was sentenced to imprisonment for not less than two years and not more than three years and six months, for a violation of what is known as Section 1202 of the Penal Law, where it is provided:

A person, who knowing it to be such:

Presents or causes to be presented a false or fraudulent claim or any proof in support of such a claim for the payment of a loss upon a contract of insurance * * * is punishable by imprisonment for not more than five years or by a fine of not more than \$500, or by both such fine and imprisonment.

An appeal was taken to the Appellate Division of the Supreme Court; the conviction was affirmed, Mr. Justice Scott writing a forceful and interesting opinion, in which all the other justices concurred (*People v. Markheim*, 162 App. Div., p. 859), and on an appeal taken to the Court of Appeals was again affirmed by a unanimous court, no opinion being written.

Prosecutions had been successfully had under this statute, but in every case after the filing of a formal proof of loss, and until the Markheim case there had never been a prosecution unless in a case where such a proof of loss had been filed. It may be instructive, therefore, to review briefly the story of the Markheim case, so that we may appreciate more fully the importance and far-reaching effect of the decision.

The Markheim Company, of which Louis Markheim was the president, was a corporation engaged in the business of importing, buying and selling at wholesale embroideries and laces, at 12-14 West Twenty-first street, New York City, occupying the store and basement. The corporation had been known by the name of Bondy, Markheim & Co., and on February 28, 1913, by an order of the

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court, its name was changed to Markheim Company, Inc. The fire occurred just before 7 o'clock on the evening of Saturday, April 12, 1913. It started in the basement and extended to the grade floor. The fire department responded promptly and in a short time had the fire under control. The Markheim Company was carrying at the time of the fire insurance on stock to the amount of \$131,000. Immediately after the fire the company retained public adjusters, who sent out postal cards notifying the companies of the fire loss. The loss came under the jurisdiction of the Loss Committee of the New York Board of Fire Underwriters, and a committee of two adjusters was at once appointed. The public adjusters took an inventory of the grade floor, and with the assistance of Markheim, president of the insured, and its bookkeeper, made up from the books a merchandise statement. This merchandise statement, purporting to be a true transcript of the books of the Markheim Company, was presented to the company adjusters on April 17; attached to it was a list of 43 insurance companies affected by the loss, showing the amount of insurance carried in each company, and with it was submitted the inventory of the stock on the grade floor. This merchandise statement showed a sound value of stock on hand at the time of the fire of \$145,663.85 and was made up as follows:

"Merchandise Statement.....Markheim Co., Inc.		
Nos. 12-14 W. 21st Street.		
Inventory as per ledger June 30/12		\$96,606.67
Purchases less Returns,		
June 30/12 to April 12/13	\$147,008.94	
Discount 6%	8,820.53	
		138,188.41
		\$234,795.08
Sales less Returns	\$137,038.08	
Goods out at memo	86.88	
		\$137,124.96
Less gross profit 35%	47,993.73	
		89,131.23
Showing Amt. of value on hand		
April 12/13 (Date of fire)		\$145,663.85"

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On the morning of the day following (April 18th), the Company adjusters, by appointment, made a visit to the premises, where they met Markheim, the president of the Company, its bookkeeper and the public adjusters. Markheim confirmed the merchandise statement which had been submitted by his adjusters and said that his books were true and correct; that the goods remaining in sight were so badly damaged as to be unmerchantable and there was practically no salvage. A request was then made for his books of account for examination in connection with the statement submitted and they were examined by the Company adjusters and found to confirm the statement; the bookkeeper assumed that the books were correct and so stated.

It may be well to recall the situation as it presented itself at that time: While there was a large water and smoke damage, it was apparent that the actual burning out of sight was slight. Markheim contended that his books were correct and the sound value of the stock on hand, as stated, was \$145,663.85; that the stock in sight both on the grade floor and in the basement was so badly damaged as to be unmerchantable and claimed, therefore, that the loss in fact exceeded the total insurance, \$131,000, or was almost to the extent of \$145,663.85, the entire sound value as shown by the books and the statement. The stock on the grade floor had been inventoried at cost at \$17,327.61, and the difference between that and the sound value shown by the books should be the value of the stock in the basement at the time of the fire, or \$128,336.25. It was clear to the Company adjusters from the examination of the books that the Company was insolvent and that the stock in the basement would not inventory in value much more than that on the grade floor; a condition so extraordinary as to require immediate and critical investigation.

Rumors were rife shortly after this visit of the sale just before the fire of large quantities of merchandise through auctioneers. This information came to the public adjusters and also to the Company adjusters. The public adjusters presented the situation to Markheim; he denied it, going so far as to make an affidavit, which was one of the important pieces of evidence on the criminal trial, to the effect that no sales of merchandise had been made other than in the regular course of business and that all sales appeared in the books of account. The public adjusters were not satisfied and continued their investigation and in some way learned that sales had been made through one Hartman, an auctioneer and commission

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merchant in laces. Markheim was confronted with Hartman and finally admitted that merchandise had been sold through Hartman and others which was not recorded in the books, and prepared and gave to the public adjusters a statement of sales that had been made amounting at cost to upwards of \$30,000. The Public adjusters refused longer to represent the Markheim Company and withdrew.

Those charged with the responsibility of protecting the interests of the Companies, were satisfied from the situation disclosed on the visit to the Markheim premises and from the information that had subsequently come to them that a claim that was in every respect false and fraudulent had been presented. The District Attorney through Assistant District Attorney Weller began immediately an investigation and the facts that I have outlined were established beyond peradventure. He was entirely satisfied a crime had been committed, notwithstanding that no formal proof of loss had been filed, and within a few days Markheim was indicted, subsequently tried and convicted and, as we have seen, his conviction unanimously affirmed by both the Appellate Division of the Supreme Court and the Court of Appeals.

To state the contention of the People and that of the defendant both at the trial and in the Appellate Courts is but to present clearly the exact issue involved:

(a) The People contended that when the fire occurred a valid and subsisting claim at once arose against the Companies interested in favor of the Markheim Company; that the defendant, its president, undertook to present that claim to the Insurance Companies and for that purpose hired public adjusters, who, pursuant to the terms of the policy, immediately notified the companies of the loss; prepared and presented under direction of Markheim the merchandise statement, which was in fact a presentation of the books themselves, and Markheim subsequently produced the books at the demand of the company adjusters to confirm the statement submitted, stating that they were correct and that the stock remaining in sight had but little, if any, value; claiming, therefore, against the Companies that the sound value of the stock was \$145,663.85 and that the loss was practically to that amount, or much in excess of the total insurance which was \$131,000, and that every step that was taken, was in the presentation of that claim to the Insurance Companies; that the books were false, that sales made by the defendant had been suppressed to the extent of at least \$30,000, of which no entry had been made in the books; that the defendant knew of the

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falsity of the claim, and every step that he took, therefore, was in the presentation of what he knew to be a false and fraudulent claim for the payment of a loss on a contract of insurance.

(b) The defendant on the contrary contended among other things that no claim had been presented but all the steps that were taken were merely preliminary. This and his other contentions could not be more tritely stated and answered than to quote from the brief of the District Attorney in the Court of Appeals. After reciting the facts, with which you are already familiar, he said:

If this didn't constitute the presentation of a false and fraudulent claim for the payment of a loss on a contract of insurance (Penal Law, 1202) it would be difficult to conceive what would.

The appellant's counsel contend in substance that there can only be a presentation of a false and fraudulent claim when no claim at all is in existence. In other words, they contend that if, for example, there was a fire but no loss and the defendant make a claim for loss, that would be presenting a false and fraudulent claim; or if no fire had occurred and he presented a claim for a loss, as if goods had been damaged by fire.

In other words, they contend that where some right of recovery has accrued, a defendant cannot be guilty of a violation of the statute by putting in a false and exaggerated amount. That is to say their contention is in substance that if a loss, of say \$1, had occurred, and a loss of \$50,000 was claimed, it would not be the presentation of a false claim.

This contention is, we submit, palpably absurd.

The Appellate Division did not discuss these contentions of the defendant, but disposed of any lingering doubt that might remain as to the character of the acts of the defendant where in its opinion, through Mr. Justice Scott, it said at page 859:

The evidence tended to show that the defendant was president of a corporation known as Markheim & Company, which carried a considerable stock of goods insured in 43 different insurance companies to an aggregate amount of \$131,000; that a fire occurred doing considerable damage; that immediately after the fire, indeed on the evening of the same day, defendant as president of the corporation made a written contract with a firm of public fire adjusters retaining them on a percentage basis to advise and assist in the adjustment of the loss with the insurance companies; that said adjusters immediately notified in writing the companies interested of the fact of the fire and the loss; that thereupon a committee of two adjusters was appointed * * * to represent as adjusters the companies affected by the loss; that defendant, in order to establish a basis for such adjustment caused to be made up and submitted to the Committee of Adjusters representing the insurance companies a statement purporting to show in detail the amount and value of the goods on hand at the time of the fire; that such statement was false and known to the defendant to be false and was prepared and presented with the purpose and intent of defrauding the insurance companies into paying a greater sum than the loss actually suffered. It should be said at the outset that the evidence leaves no possible doubt in our minds of the defendant's guilt.

It may be interesting to recall some of the evidence adduced during the course of the trial to show Markheim's method of operation, in some respects rather ingenious. You may remember

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that the corporation had changed its name in February from Bondy, Markheim & Company to Markheim Company, Inc. After the change was made Markheim opened personally an account in the Union Exchange National Bank using the old name Bondy, Markheim & Company, and in this account he deposited a large part of the proceeds of suppressed sales of merchandise which he used for his own purposes, many of the Hartman checks being drawn to the order of Bondy, Markheim & Company. He used this account, in other words, as a "clearing house" for many of these transactions. There were other bank accounts, one in the name of a member of his family, in which similar transactions to a large amount were traced. In several instances in what was known on the books as the "Exchange Account" would be found amounts representing checks drawn to "Cash" which were finally traced to be the proceeds of a sale not entered and which had been deposited in the regular account of the Markheim Company and checks then or later drawn to Markheim at his request for the same amount. It may be assumed that in many instances the reason for making these seemingly helpful contributions was because of a real necessity at that particular time for protecting the regular bank account of the company against overdraft; the contributions were but temporary, however, and were not permitted to remain for any length of time. At another time the bookkeeper was informed by Markheim that merchandise, the sale of which had been regularly entered in the books and for which he had received a check in payment, had been returned; the account of the customer was then credited by her with the return of the merchandise and the check which he had received in payment was deposited in one of his "clearing house accounts" mentioned. Another and rather interesting instance, in that it differed from the method ordinarily adopted, was a transaction with Siegel & Company of Boston. It appeared that merchandise had been sold to Siegel & Company but all the sales had not been entered in the books. When the check for the Siegel purchases was received it was naturally for an amount larger than the sales appearing in the books. Markheim told the bookkeeper that it was an overpayment, and at his request she made an entry in the stub of the check book of a check to return to Siegel & Company the amount of the over-payment, and when she drew the check itself she was asked by Markheim to draw it to "Cash" so that it might be put through the Siegel New York store. It is hardly necessary to add that the check found its way into Markheim's

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personal account. These transactions are fairly illustrative of the manner in which Markheim operated in suppressing sales and appropriating the proceeds. The bookkeeper had no reason to question the accuracy of the books and was not cross-examined. The defendant did not take the stand but rested upon the contentions already set forth.

It will not be surprising to learn that while on the criminal trial the suppression of sales, for reasons which the District Attorney thought sufficient, was confined to about \$30,000, which had been admitted by Markheim; there was in fact suppression of sales of upwards of \$70,000.

The Markheim Company subsequently filed formal proofs of loss on the companies interested, verified by the Secretary, in which it was claimed that the sound value of the stocks in sight at the time of the fire was not \$145,663.85, but \$73,441.41, with a damage of \$49,832.07, and in the claimed sound value and damage was included an amount of \$15,000 as the value of goods burned out of sight. It would appear, therefore, from the proofs of loss, indulging in what, under the circumstances, might be said to be a violent assumption even for the purpose of argument that they are correct, that merchandise of upwards of \$70,000 at the least had been taken from the premises before the fire, sold and the sales suppressed. The Markheim Company was in fact insolvent, was finally adjudged bankrupt and a trustee appointed, who instituted civil actions against the companies interested.

The criminal case has passed into history and another and most important step has been taken not only for the protection of the Insurance Companies against fraudulent claims but indeed for the protection of the entire community. The effect of such a decision can hardly be measured; it will deter one so disposed from presenting or attempting to present a fraudulent claim for he is warned by the Markheim case to have a care at the very outset that his claim be honest and that in the State of New York at least a crime may be committed under this Section of the Penal Law notwithstanding that there has been no filing of formal proofs of loss and it will naturally have a strong tendency to discourage fraud of every kind in relation to the insurance contract—a contract with which the Public interests are so closely related.

While there had been much doubt, therefore, as to what constituted a claim against an Insurance Company that has now been dispelled. There has never been much question as to what really

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constituted a satisfactory formal proof of loss, and the doubt, if any there be, may be caused in part at least by the decisions involving the application of the doctrine of waiver and estoppel.

It would seem, a work of supererogation to do more than to review briefly a subject which has been given so much critical consideration by the text writers on Insurance Law, to whose indefatigable labors in research, painstaking analytical discrimination and lucidity of exposition this modest paper owes its being.

The conditions that we are now to consider are those that apply only after the loss has occurred and it may be well to recall the significant language of *McNally v. Ins. Co.* (137 N. Y., 389), where the court said at page 397:

Those conditions which operate upon the parties and the contract prior to the loss, such as the condition and situation of the property and the relations of the insured to it, and all statements and representations preceding the contract, are matters of substance, upon which the liability of the insurer depends. Such stipulations are important, as their general object is to define and determine the limits of the risk assumed and to point out the conditions and circumstances under which the insurer has agreed to become liable in case of loss. Those conditions are to receive a fair construction according to the intention of the parties. Those conditions which relate to matters after the loss, have, for their general object, to define the mode in which an accrued loss is to be established, adjusted and recovered, after the reciprocal rights and liabilities of the parties have become fixed by the terms of the contract, and are to receive a more liberal construction in favor of the insured. In determining the liability of the defendant it is entitled to the benefit of its contract fairly construed and can stand upon all of its stipulations. But when its liability has become fixed by the capital fact of a loss, within the range of the responsibility assumed in the contract, courts are reluctant to deprive the insured of the benefit of that liability by any narrow or technical construction of the conditions and stipulations which prescribe the formal requisites by means of which this accrued right is to be made available for his indemnification.

Compliance with these and other conditions may of course be waived or the company may so act as to estop itself from insisting upon it. We shall consider the subject of waiver and estoppel only in so far as it relates to the conditions which are the subject of the talk this evening, and it might be well to have a clear definition of those terms, and we find it in *Draper v. Oswego Fire Relief Assn.* (190 N. Y., 12,) where the Court in reviewing other well known cases said, at page 16:

The law as to what constitutes a waiver was correctly laid down by the trial judge substantially in the language used by this court in *Kiernan v. Dutchess County Mut. Ins. Co.* (150 N. Y., 190) and repeated in *Walker v. Phoenix Insurance Co.* (156 N. Y., 628). * * * While that doctrine and the doctrine of equitable estoppel are often confused in insurance litigation, there is a clear distinction between the two. A waiver is a voluntary abandonment or relinquishment by a party of some right or advantage. * * * The doctrine of equitable estoppel,

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or estoppel in pais, is that a party may be precluded by his acts and conduct from asserting a right to the detriment or prejudice of another party who, entitled to rely on such conduct, has acted upon it.

Two of these conditions, the notice of the fire and the proof of loss, are what the law regards as conditions precedent, that is to say, they are conditions which precede any liability and must be complied with by the insured without any requirement on the part of the company before the loss becomes payable. Other provisions, which have been aptly termed requirements, are those with which the insured need not comply unless requested so to do, such as furnishing magistrates' certificates, plans and specifications, books and bills, the examination under oath and the appraisal; in some states however a "disagreement" as to the amount of the loss would make the appraisal too a condition precedent to any action on the policy.

THE NOTICE OF LOSS.

Before taking up the subject of the inventory and proof of loss, we might stop to consider that condition of the policy which requires *immediate* notice of loss in writing. The object of the notice is that the company may know that a loss has in fact occurred, and take such action as it considers proper to protect its interests. This condition has been construed from time to time and there are many cases in this and other states relating to it. While the policy condition in terms requires an immediate notice of loss, it might be said from an analysis of the many decisions on the subject that notice must be given with due diligence and as soon as circumstances will permit, and that what, under the circumstances, is a reasonable compliance with the condition must be determined from the facts of each case.

It would appear (a) that if the company knew of the fire or got notice of it from any one it would be sufficient. For example, if an officer of a company knows of the fire and visits the place of the fire *Roumayer v. Ins. Co.* (13 N. J. L., 110) (b) that delay in giving notice may not under the circumstances be unreasonable.

In *Will & Baumer Co. v. Rochester German Ins. Co.* (140 App. Div., 691,) a proof of loss was served within sixty days after the fire, there being no previous notice of loss. The delay was due to the fact that owing to the confusion after the San Francisco earthquake and fire, plaintiff was for fifty days unable to ascertain what property had been destroyed, and it was said, per Robson, J., at p. 694:

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It would seem that the useful purpose to be served by requiring plaintiff to give defendant this notice was that it might be promptly advised that a fire had occurred. That information defendant had as early and quite as fully and particularly as had plaintiff.

And in *Solomon v. Ins. Co.* (160 N. Y. 595) where by reason of failure to obtain the policy for about fifty days after fire no notice was given until that time by a general assignee for creditors, the Court held the notice sufficient.

(c) That the company may of course waive the notice or so act as to estop itself from insisting upon the breach, as by denying liability (*Omaha Ins. Co. v. Duke*, 43 Neb. 473); or by requiring corrections in proofs filed (*Weed v. Ins. Co.*, 133 N. Y., 394.)

THE INVENTORY.

The policy requires, as the next step we are to discuss, that the insured shall make a complete inventory, stating the quantity and cost of each article and the amount claimed thereon. While there is no specific provision requiring the insured to furnish the inventory to the company, the only reasonable inference is that that is the purpose in having it made, and a reasonable interpretation of the policy condition would require that the inventory should be delivered to the company. As a matter of practice this is generally done, and is one of the first steps taken by the public adjuster, and a copy is ordinarily attached to the proof of loss.

It is provided that the insured shall state in the inventory the cost and quantity of each item of damaged and undamaged property and the amount claimed and in the proof of loss the cash value of each item and the amount of loss thereon.

The Court in *McManus v. Western Assn. Co.* (22 Misc. 269; affirmed 43 App. Div., 550) pointed out the difference between the two papers.

THE PROOF OF LOSS.

The policy conditions on the subject of the proof of loss are clear and concise, and the company is entitled to receive from the insured so much of the information therein specified as he can with due diligence furnish. A glance shows the information to be of great importance to the company; it relates to knowledge of the origin of the fire, the title to the property, the cash value of each item and the amount of loss thereon, other insurance, etc., and may be insisted upon, and the insured will not be excused from complying unless under circumstances where he is unable to do so; he is bound to do what is reasonable to fully comply with the conditions.

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A statement showing the cash value of each item and the amount of loss thereon is of course often impracticable and is generally complied with by submitting, with an inventory of the stock in sight and the damage claimed, a statement made up from the books, taking the latest inventory as its starting point and adding the purchases and labor and deducting the sales with a proper allowance for profit, thus getting the sound value at the time of the fire and the claimed loss.

The Court in the Davis case (15 Misc., 263; affirmed 157 N. Y., 685) refers to the practice.

Where an attempt is made to comply with the provisions and a paper purporting to be a proof of loss is filed with the company within the time limited and is defective, either by reason of the failure to state the requirements of the policy provisions or by some defect in the signature or oath, then it is the duty of the company to object to the proof, so that the insured may correct it; and if the company fail to take such action it would be estopped from contending thereafter that the proofs of loss did not comply with the conditions of the policy. Cases in which this question was discussed are the following: In *Weed v. Ins. Co.* (133 N. Y., 394) it was held that an objection that proofs had not been made by the proper person is untenable if they were retained without objection. And in *Cummer v. Ins. Co.* 97 App. Div. 151; affirmed 173 N. Y., 633) it was held that where the insurer retains proofs filed in attempted compliance, it cannot set up as a defense that they were incomplete.

The objections, if any, to the proofs must be taken within a reasonable time, they should be specific and the insured given a reasonable time thereafter to correct the claimed defects; and what is a reasonable time will be determined from the facts in each case; it might under some circumstances extend beyond the sixty day limit (*Planters Mutual Insurance Association v. Hamilton*, 77 Ark., 27.) It would seem that such defects as are not specifically pointed out would be waived (*Titus v. Glens Falls Ins. Co.*, 81 N. Y., 410; *Levine v. Lancashire Ins. Co.*, 66 Minn., 138.)

The general rule is that the mere retention of an informal paper which does not in any way attempt to comply with the conditions of the policy respecting proofs of loss would not estop the company from insisting that they had not been complied with (*Beatty v. Ins. Co.*, 66 Pa. St., 9); it is necessary however to consider the following cases where it was held that the company may so act in relation to a purely informal paper as to estop itself from

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insisting upon a formal proof. The case of *Glazer v. Ins. Co.* (190 N. Y., 6) involving a loss of household furniture was tried two or three times and finally went to the Court of Appeals. It appeared that the insured had filed an inventory unverified showing the quantity and cost of the property destroyed and injured, and the amount claimed thereon. The Court of Appeals, by a divided court, held that it was a question of fact for the jury to determine whether the defendant by retaining the paper without any objection until the sixty days had expired, by using it for the purpose of identifying property and ascertaining for itself the amount of the damage to the various articles covered by the policy, and then entering upon negotiations based upon the contents of the paper for a settlement of the claim, led the plaintiff to believe that no further proofs of loss would be required and so waived their service. Similar cases are: *Greengrass v. North River Ins. Co.* (139 Supp., 937); *Curnen v. Ins. Co.* (159 App. Div., 493); *Weber v. Germania Ins. Co.*, (16 App. Div. 596.)

The *Glazer* and similar cases were, however, decided upon the peculiar facts of each and must be looked at from that view point. They will not, of course, be held applicable to the ordinary case where the complete inventory mentioned in the policy is filed and the usual investigations made, and it may be observed that the Court in the *Glazer* case does not accurately set forth the policy conditions, but confuses the complete inventory with the proofs of loss, saying at page 10:

The provision of the policy in respect to proofs of loss is, in substance, that if a fire occurred the insured should give immediate notice of any loss to the company in writing; make a complete inventory of the property lost or damaged, stating the quantity and cost of each article and the amount claimed thereon, within sixty days after the fire, and signed and sworn to by the insured, stating the time and origin of the fire and other matters not material to this appeal. The paper contained a complete inventory of the property damaged or destroyed and the amount claimed on account of each article, which aggregated \$242, but was not signed or sworn to by the insured.

Where other interests are insured by the policy, an important question arises as to whether they can protect that interest by filing a proof of loss where the insured has failed to do so or, indeed, whether they are in such a case required to file any proof. These questions arise, among others, in three cases. Where there is (1) a mortgagee claiming under a Standard Mortgagee Clause; (2) a simple loss payable clause to a mortgagee or other interests are to be treated by others later in these articles and will not now be considered further than to say that such interests may under

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certain circumstances file proofs (*McDowell v. Ins. Co.*, 207 N. Y., 482; *Czerweny v. Ins. Co.*, 139 Supp., 345); and it might be argued that these and other cases are authority for the proposition that there is no condition of the policy requiring them to do so; while this is undoubtedly true regarding the interest of a mortgagee under a Standard Mortgagee Clause (*Heilbrunn v. Ins. Co.*, 202 N. Y., 610), such an argument would do violence to the plain reading of the policy provisions in so far as any of the other interests mentioned are concerned.

The general opinion of the text writers is that the company has the right to insist that the proof of loss shall be signed and sworn to by the insured. Exceptional cases are *McManus v. Ins. Co.*, (22 Misc. 269; affirmed 43 App. Div. 550), where in a loss on household furniture it was said that the Company could not require the oath of members of the household owning articles claimed for; *Sims v. Assurance Co.*, (129 Fed. (Ga) 804), by a Receiver in Bankruptcy which included an affidavit by the agent of insured; the insured having fled the jurisdiction; *Matthews v. Ins. Co.*, (154 N. Y. 449), where it was said that either the Temporary administrator, the heirs, next of kin, legatees or devisees might have filed proofs.

The Company may, of course, waive the signature and oath of the insured or estop itself from insisting upon it by failing to reject proofs verified by one other than the insured (*Kernochan v. Ins. Co.*, 17 N. Y., 428; *Weed v. Ins. Co.*, 133 N. Y., 394).

There is no specific requirement in the policy as to where the proofs shall be filed; the insured is required to render the statement to the Company and it may be useful to note some of the decisions on that subject. The condition will receive a reasonable interpretation. In Iowa filing the proofs with a local agent is sufficient (*Greenlee v. Ins. Co.*, 104 Iowa, 481); in Nebraska with a state agent (*Ins. Co. v. McLimans*, 28 Nebraska, 653); and in Georgia with an adjuster (*Ins. Co. v. Vining*, 67 Ga., 661).

The condition that proofs of loss are to be filed within sixty days after the fire, unless such time is extended in writing by the company, has given rise to some questions worthy of review.

The words "sixty days after the fire" has been interpreted by the Court to mean that the time begins to run from the termination of the fire and not from the time of the commencement.

National Wall Paper Co. v. Ins. Co., (175 N. Y., 226, at page 228:

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We think, therefore, that the fair and reasonable interpretation of the provision is that the proofs of loss should be served within sixty days after the fire has terminated, or abated to such an extent that an inspection of the property damaged may be had.

Mailing the proofs before the expiration of the time limit is not sufficient; the company must receive the proofs within the sixty days. In the case of *Peabody v. Satterlee* (166 N. Y., 174) it was held that mailing proofs of loss in Buffalo on the sixtieth day for delivery in New York, which did not reach the Underwriters until the sixty-second day, was not a compliance with the condition; and it would be reasonable to assume from the reasoning in that case that it would not be a sufficient compliance if the proof were mailed on or before the time limited in a city where the Insurance Company had its office and where the custom of the postal authorities is to deliver the mail by carriers, but which did not in fact reach the company until after the time limited. The Court, citing the case of *Crownpoint Iron Co. v. Aetna Insurance Company* (127 N. Y., 608), said, p. 178:

The above case, while not presenting the question now before us, is instructive as deciding that when the insured uses the mail in communicating with the company it is nothing more than if he had made the same communication by private messenger, when he is seeking to do an act that would be binding on the company whether it was willing or not.

As already pointed out, the policy provides that the assured within sixty days shall render this statement. The *Century Dictionary* defines the word "render" as meaning "to give; furnish; present." Webster's gives its meaning as "to furnish; state; deliver." A proper reading of the quoted provision of the policy is that the insured is to furnish or deliver to the defendants these proofs of loss, and this clearly means that the papers shall be so furnished to the defendant personally, or to their duly authorized agent if they have one. In cases of this kind substituted service or service by mail is either matter of statute or contract. In this case the contract is silent, and the depositing of the proofs of loss in the mail at Buffalo on the sixtieth day after the fire occurred cannot be held a compliance with the provisions of the policy.

This case was followed in *Lake Geneva Ice Co. v. Selvage* (36 Misc., 212), where the proofs were mailed in Chicago on the sixtieth day for delivery in New York; to the same effect, *Slocum v. Saratoga Ins. Co.*, (140 App. Div., 867). A somewhat contrary doctrine has, however, been held in Illinois (*Ins. Co. v. Zeitinger*, 168 Ill., 286), where the agent of the insured's executor, under a policy containing a similar provision was said to have complied with the provision by mailing proofs within sixty days which were received two days late. And in Missouri (*Caldwell v. Ins. Co.*, 61 Mo. Ap., 4), where proof mailed in Missouri directed to the Company at Boston, Mass., a few days before the expiration of the time limit reached the postoffice at Boston on the last day, it was held sufficient and the Court said:

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The defendant cannot by delaying to call for the proofs under these circumstances work a forfeiture. It might as well delay for the calling of the proofs on the succeeding day and thus work a forfeiture.

The proof shows that the defendant had a box at the Post Office and it nowhere shows that the notice of the Registered letter was not in that box in time on Sunday to have enabled the clerk of the defendant to get the package on that day had he called for mail in the box.

In New York State under Section 20 of the General Construction Law, Chapter 27, Laws of 1909, if the sixtieth day occurred on Sunday it would be sufficient compliance if the proofs were received by the Company on the following day.

This condition, like others, may be waived or the company be estopped from complaining. Cases involving these questions are numerous and we may stop to consider a few of them.

(a) The mere retention of the proofs would not, in New York at least, waive the time limit.

In *Perry v. Caledonian Ins. Co.* (103 App. Div., 113) plaintiff served proofs sixty-five days after the fire and it was held that the performance of the condition was not waived by their retention; it was said, per Houghton, J., at page 116:

It is urged that the retention of the proofs of loss and failure to return them was a waiver of earlier service, and that the defendant is now estopped from claiming that they were not regularly served. We do not think this position is tenable. Silence operates as an assent and creates an estoppel only where it has the effect to mislead. (*More v. New York Bowery Fire Ins. Co.*, 130 N. Y., 537). The plaintiff was in no way misled by the retention of the proofs of loss. His rights were gone before he attempted to serve them. His position was made no different because the company ignored his statement or failed to inform him that his proofs of loss were not properly furnished.

And in *Bell v. Ins. Co.* (19 Hun., 238), where the fire occurred on January 11, 1873, and they were mailed sixty days thereafter, but not received until after the expiration of sixty days, held there was no waiver by retaining them.

(b) The retention of proofs filed after the time limit where acts are done which may mislead the insured into believing that the objection will not be taken may estop the company from insisting on the breach. *Brink v. Hanover Fire Ins. Co.* (80 N. Y., 108), is a case in point and the language used is somewhat disturbing, but on a careful examination of this and similar cases it will be seen that it is not held that the mere retention of the proofs would be an estoppel, but there were other facts taken together with the retention of the proofs which were held sufficient to estop the company from claiming a breach of the condition and the language must be considered in association with the other facts in this case. The Court said in the *Brink* case at page 113; per Church, C. J.:

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The plaintiff's claim was challenged for fraud and that only. They acted upon it and brought an action incurring large expenses in its prosecution. Non constat, if the failure to file the proofs in time had been insisted on, but that the plaintiff would have acquiesced in it and refrained from prosecuting, and thus they might be injured by the change of ground on the part of the defendant. Every consideration of public policy demands that insurance companies should be required to deal with their customers with entire fairness and frankness. They may refuse to pay without specifying any ground, and insist upon any available ground, but if they plant themselves upon a specified defense and so notify the assured, they should not be permitted to retract after the latter has acted upon their position as announced, and incurred expenses in consequence of it. If a company intends to avail itself of the technical objection that the proofs are not filed in time, common fairness requires that it should refuse to receive them on that ground, or at least promptly notify the assured of their determination, otherwise the objection should be regarded as waived.

Similar cases are *Rademacher v. Ins. Co.* (75 Hun. 83); *Dobson v. Ins. Co.* (86 App. Div., 115; *affd.* 179 N. Y. 557):

We have considered specific instances of the application of the doctrine of waiver and estoppel in relation to the proofs of loss where there has been some attempt at compliance and it might be wise to add a word as to the character of the action by the company or its authorized representatives that would make unnecessary the filing of any proof of loss: (a) where the action of the company has induced the insured not to make proofs (b) where it recognizes liability and indicates that proofs will not be required, and (c) where the company makes it apparent that the furnishing of proofs would be a useless formality—by denying liability.

We must not overlook, however, in this connection the provisions of the policy to the effect that the company shall not be held to waive any of the conditions or any forfeiture by any act, requirement or proceeding on its part relating to the appraisal or the examination.

This provision of the policy has been held binding generally in the following cases, but the point whether an examination or appraisal might be held to waive proofs of loss was not in question and not considered.

In *Gibson Electric Co. v. Ins. Co.* (10 App. Div., 225; *affirmed* 159 N. Y., 418), it was held that, under a standard policy, proceeding with an appraisal was not a waiver of a forfeiture. A similar case is *Walker v. Ins. Co.* (156 N. Y., 628).

The case of *Paltrovitch v. Ins. Co.* (68 Hun. 304-308 *affd.* 143 N. Y., 73) would seem to be an authority for the statement that the examination would not be a waiver of proofs of loss and the case of *Rademacher v. Ins. Co.* (75 Hun. 83), while very

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close, can be distinguished for the reason that there were apparently acts other than the appraisal in question.

In Rhode Island (*Fournier v. Ins. Co.*, 23 R. I., 36) it was held that under such a provision no waiver of proofs would result from a demand for an appraisal; while in Kentucky (*Smith v. Herd*, 60 S. W., 841) involving a policy containing a similar provision it was held that by an appraisal there had been a waiver of proofs of loss; and in Wisconsin (*Badger v. Ins. Co.*, 49 Wis., 396) where there was no such provision it was held that calling an examination within the sixty days from the fire was a waiver of proofs of loss.

It may be said, therefore, that in New York State the provision would be held binding and that no waiver or estoppel as to proofs of loss could be based upon examination or appraisal required within a reasonable time.

There are cases in New York State holding that an examination called (*Carpenter v. Ins. Co.*, 135 N. Y., 298) or an appraisal instituted (*Bishop v. Agricultural Ins. Co.*, 130 N. Y., 488) after "tardy" proofs would waive the forfeiture; they may be distinguished, however, for the reasons (a) they were decided before the Standard Policy took effect and the provisions were dissimilar, and (b) there were other facts taken in connection with the examination or appraisal which were in fact the basis of the court's decision.

Before leaving the conditions respecting the proofs of loss, it may be well to call attention to the statute in New Jersey which relieves the insured from filing proofs unless requested to do so. The statute (Chapter 340, Laws of 1911, Sec. 1) reads as follows:

Sec. 1. The failure of any person insured against loss or damage by fire in any insurance company doing business by or under the authority of the Department of Banking and Insurance of this State to furnish proofs of loss shall not be or considered a waiver of any rights accruing under the policy of insurance, and shall not debar the person so holding insurance from a recovery under said policy or the collection of such sum as should properly be paid under said policy, unless after said loss sixty days' notice, in writing, that said company desires said proofs of loss be furnished the person so insured.

It will be noticed that there is no time fixed within which the company is required to demand the proofs, but sixty days' notice must be given; it will probably be held, when the question is presented that the company should make its demand within a reasonable time and at least within sixty days after the fire, as under the

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loss payable clause, the loss, in the absence of a demand for an appraisal, would otherwise become payable sixty days after notice of the fire.

PLANS AND SPECIFICATIONS; MAGISTRATE'S CERTIFICATE.

Among the requirements are found that of the Magistrate's certificate and the production of plans and specifications and while we know that these are not a part of the proofs of loss they may be required and thus become requirements with which the insured must comply. Much has been written regarding the Magistrate's certificate and in some communities it is still a requirement of some importance to the Company; it is not often insisted upon in New York City.

The production of plans and specifications is often a requirement of great importance and frequently demanded. These and similar requirements are subject to the rule of reason. Wherever the question has been discussed it resolves itself into what is reasonable. The demand must be made within a reasonable time and a reasonable compliance with due diligence must be made and, until had, no suit may be maintained as we shall see when we reach that provision of the policy. There is nothing new in the books on this subject and we might in passing restate some of the decided cases giving the best illustration of the manner in which the provisions relating to the magistrate's certificates have been construed.

The demand must of course be a specific one apprising the insured what will be required. *Moyer v. Ins. Co.* (176 Pa. St., 579). The magistrate or notary must be disinterested and he may be disinterested though he is a creditor of the assured, *Dolliver v. Ins. Co.* (131 Mass., 39); but not if he is a relative, *Ins. Co. v. Bank* (62 Fed., 222); nor if he is the insured although he has assigned the policy, *Stevens v. Ins. Co.* (32 New Brunswick, 394). A magistrate lives nearest the place of the fire, if either his office or his residence is nearest to it, *Paltrovitch v. Ins. Co.* (143 N. Y., 73). The affidavit of the magistrate must contain a venue or it will be fatally defective, *McManus v. Western Ins. Co.* (22 Misc., 269). If the certificate states that the insured has sustained the loss claimed it is sufficient, *Brown v. Hartford Ins. Co.* (52 Hun. 260; affirmed without opinion 132 N. Y., 539). If required within sixty days after the fire the certificate must be furnished within the sixty days, *Gottlieb v. Ins. Co.* (89 Hun. 36). If the nearest magistrate refuses to issue a certificate that of the next nearest may be secured,

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Lang v. Ins. Co. (12 App. Div., 39). If the company desires to raise the objection that the certificate is not made by the magistrate or notary living nearest the place of the fire it should state the name of the one living nearer the fire so that the insured may obtain his certificate, *Paltrovitch v. Ins. Co.*, (143 N. Y., 73).

THE EXAMINATION UNDER OATH; THE BOOKS AND BILLS.

The examination under oath of the insured and the production of books of account and bills are two very important requirements of the policy in the investigation of the loss and its determination. It may be said that in some cases the examination is imperative, in others necessary and in most cases which seem to require any investigation very useful. There has not been much discussion in the courts of these provisions of the policy for the reason that they are generally complied with. It may be said generally that such an examination must be called within a reasonable time and conducted in what under the circumstances of each particular case is a reasonable manner. Many questions relating to such an examination arise as to which no answer may be found in the decided cases and one must be guided by the rule of reason. What is a reasonable place to hold such an examination, or rather what is a reasonable place to require the insured to attend for such examination is often asked. A glance at the cases will show some difference of opinion but no fixed rule. This question came up recently in our Courts in the case of *Kline Brothers & Company v. Factors Insurance Co. of Memphis, Tenn.* (156 A. D., 945) where the policies covered property in Quincy, Florida, the property of a corporation, and were issued by companies not admitted in that state. The insurer called an examination to be held at Cleveland, Ohio, where the corporation maintained an office, or in the alternative at New York where its books and contracts were. The corporation refused to submit to examination at any place other than at Quincy and the insurer did not wish to conduct an examination there as it had no license to do business in Florida. A jury found that the demand made by the Insurer was reasonable and that the insured had not complied with the condition of the policy requiring examination. The judgment entered on the verdict of the jury was affirmed without opinion in the Appellate Division and an appeal is now pending in the Court of Appeals. In Missouri it is said that when the insured resided in New York and insured his property in Missouri in a Missouri Company he could be compelled to submit to examination where the

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insured property was located, *Fleisch v. Ins. Co.* (58 Mo. Ap., 596), and similarly, in another case, *Murphy v. Ins. Co.* (61 Mo. Ap., 323), it was held that insured was not required to produce his books at the office of the adjuster six miles from the place of the fire the court saying:

In our opinion the provision should not ordinarily be considered as embracing any other places than at or near the scene of loss.

In Illinois on the contrary it was held that insured living in Illinois claiming for property located in Missouri and insured in a Missouri Company could not be required to submit to examination in Missouri, *Ins. Co. v. Simpson* (43 Ill. Ap., 98). In Pennsylvania, the courts have decided that it was reasonable to require that where the fire occurred in the place of business of the insured at Lancaster he could be compelled to produce his books in an adjacent county where the insurer maintained its office, *Seibel v. Ins. Co.* (46 Atl. 851). In Nebraska the courts have said that the place of examination must be one conveniently reasonable and in the county where the insured resides, *Aetna Ins. Co. v. Simmons* (49 Neb., 811).

It will be seen that it is impracticable to deduce any fixed rule from such decisions as have been rendered and one might advise that the company should in making its demand fix a place that under the circumstances would appeal to the ordinary man as being a reasonable place, reasonably convenient to both insured and insurer and not imposing any undue hardship on either. If I were asked to make any suggestion on the subject I should say that the examination should be required only when necessary for the protection of the company's rights and then one should pursue the lines of least resistance with an eye single to the accomplishment of the desired object.

A question even more important comes up frequently and is not easy of solution—Who may be examined under this provision of the policy? The policy, it is true, states that it is the insured and the inquiry arises whether the company has the right to examine any person other than the insured. One gets but little light from any of the books on this subject and it may be said that it is still an open question. In a recent case in the New York City Court, *Friedman v. Ins. Co.* (New York Law Journal, May 20, 1913; aff'd without opinion at the Appellate Term of the Supreme Court in May, 1914) it was said by the court, in denying a motion to set aside a verdict where the jury had been permitted to consider whether the company was justified in insisting upon the examination of the son of the insured, in view of the insured's statement that he knew

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nothing about his books and that his son knew all about them, that the jury was entitled to consider whether or not the failure to produce the son, who was under the control of the insured, constituted performance of the terms of the contract of insurance on the part of the plaintiff and a verdict for the defendant would not be disturbed. While there does not seem to be any other decision on the subject which a diligent search of the books would disclose, it is not unreasonable to assume that whenever the question is presented it will be determined somewhat from the standpoint of common sense. It was intended, I take it, that the company should by that provision have the opportunity to satisfy itself as to the facts and circumstances surrounding the fire and claim and that such an inquiry under the provisions would be useful for that purpose, not futile or fruitless.

There are many instances where the insured knows nothing of the property involved or of the circumstances concerning the loss, but has left the care of the entire matter to some other person acting for him and under his control; and it would seem under such circumstances that a reasonable interpretation of the provision would require that an examination of that person, the insured's *alter ego* as it were, should be permitted. What is true of the enforcement of other provisions of the policy is also true of this one, that each case would depend upon its particular facts and what under the circumstances would be reasonable would control. It may be said, however, in this connection that the company has the absolute right to the examination of the insured; and it may be of interest to consider the effect of an offer of a Receiver in Bankruptcy to submit to examination in the absence of the insured and as a substitute for him. That particular situation arose in Georgia, and the Court held (*Sims v. Assurance Society*, 129 Fed. 804) that such a Receiver could not in respect to the right of the company to an examination under oath take the place of the insured. A case involving a somewhat similar principle arose in South Carolina (*Pearlstine v. Ins. Co.*, 70 S. C., 75).

The general statement is made from time to time that on such an inquiry only material questions need be answered; this is unquestionably so, but it would seem that a rather wide latitude should be given in view of the nature of the inquiry and its logical relation to those conditions of the policy providing for the information required by the inventory and the proofs of loss and for forfeiture in case of any fraud or false swearing and would make

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material any inquiry "touching any matter relating to the insurance or the subject thereof whether before or after a loss."

The materiality of the question must of course be determined in the first instance by the insured; there is no process through which he may be compelled to answer. And what is a material question, of course, will in the last analysis be decided by the courts and only when that question arises in an action brought to recover the loss. What is and what is not a material inquiry upon such an examination may be a question of law for the court, or of fact for a jury, depending upon the facts and circumstances of the case. Cost for instance may not always be a material inquiry (*Porter v. Ins. Co.*, 164 N. Y., 504); ordinarily it is. The policy itself makes it an important one when by its provisions the insured is required "to make a complete inventory stating the quantity and cost of each item and the amount claimed thereon," and in the celebrated case of *Clafin v. Ins. Co.* (110 U. S., 81, the United States Supreme Court held that questions as to the manner of payment for articles claimed for were material, and that intentionally false answers avoided the policy notwithstanding the contention that the answers were made not to prejudice the insurance companies but to mislead other persons.

The insured must of course comply with a requirement that he subscribe the examination but there must be a specific demand.

There are some other and very practical questions relating to these examinations which come to perplex the company adjusters at least, and before leaving the subject we might refer to them. They are (a) when such examination should be called and (b) whether more than one company may join in the call for it.

From an analysis of what has been written on the subject it would seem (a) that the examination must, of course, be called at a reasonable time; and what is a reasonable time would depend entirely upon the circumstances of the case. Where no demand for appraisal is made the examination should be called at a reasonable time within sixty days after the filing of proofs and in many cases there are often surrounding circumstances which reasonably justify the continuance of the examination beyond the time limited. Where, however, an appraisal is had and an examination is necessary, a request during the course of the appraisal, or within sixty days after the appraisal award would appear to be reasonable. There does not seem to be any case which is decisive upon this particular question, and the rule of reason must control. (b) Cases

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involving a joint demand for appraisal are somewhat analogous and while there is a great difference of opinion, it would be reasonable to assume that a joint demand would be proper where the provisions of the respective policies are exactly similar. In a case arising in Ohio (*Insurance Company v. Hamilton*, 59 Federal, 258), a joint demand for appraisal was held improper; the respective policy provisions differed. In Michigan, where all the policies were similar, *Wicking v. Ins. Co.* (118 Mich., 640), the practice was approved; but in Kentucky (*Ins. Co. v. Asher*, 100 S. W., 233), and in Tennessee (*Ins. Co. v. Robertson*, 106 Tenn., 557) the decisions are to the contrary.

While the point is interesting it is not of great moment in its relation to the examination at least where in case of objection a separate and similar demand on the part of each company would be productive of the desired result.

What has been said of the examination may with equal and greater force be said of the exhibition and production of books, bills, etc., as required by the policy provisions; the insured is bound to comply with such a requirement in good faith, with due diligence, and to make every reasonable effort to furnish to the company the requisite information.

WHEN THE LOSS IS PAYABLE AND WHEN IS SUIT SUSTAINABLE.

It might occur to one that there was some inconsistency in the construction which the Courts have placed upon that provision of the policy where it is said that the "loss shall not become payable until sixty days after the notice, ascertainment, estimate and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers, when appraisal has been required." At first reading the words "satisfactory proof of the loss" it would seem, ought to include the examination of the insured and the production and exhibition of his books, bills, etc. The courts have in fact construed this provision otherwise. The rule is that while the loss is payable at a certain specified time no suit is sustainable either at law or in equity until the insured has complied with other requirements of the company reasonably made.

In *McAllister v. Niagara Fire Insurance Co.* (156 N. Y., 80) which involved a policy in the standard form, the court held that the election to rebuild which is provided for in the policy "on giving notice within thirty days after the receipt of the proof herein required of its intention so to do" must be exercised within thirty days from the receipt of the formal proofs of loss, following *Clover*

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v. Greenwich Fire Ins. Co. (101 N. Y., 277), where it was held in an action on a policy not in the standard form but of somewhat similar text that the proofs intended are the formal proofs of loss unconditionally required to be made by the Insured. In *McNally v. Phoenix Ins. Co.* (137 N. Y., 389) which did not involve a policy in the standard form it was held that a magistrate's certificate was not part of the proofs and the loss became payable sixty days after the filing of the formal proofs of loss. To a similar effect is *Lawrence v. Niagara Ins. Co.* (2 App. Div., 267; affirmed 154 N. Y., 722).

The result from the present condition of the Law in this State at least would seem to be:

(1) That the loss becomes payable: (a) within sixty days after notice and the filing of formal proofs which comply with the requirements of the policy if in the meantime no appraisal or ascertainment of the loss be had. (b) Where there has been an award the loss is payable sixty days from the making of the award unless proofs of loss were filed after the making of the award when the loss will not then be payable until sixty days from such filing. (c) If the loss be determined by agreement between the insured and the company, it will be payable sixty days from said determination unless proofs of loss were filed subsequent to that time in which case it would not become payable until sixty days from the time of filing.

(2) That suit is sustainable only after the loss becomes payable and the insured has fully complied with such requirements as have been demanded within a reasonable time. If therefore the time limited has passed and the loss becomes payable the insured upon complying with the requirements could sue immediately.

The courts of other states have adopted somewhat similar reasoning. In *Illinois* (*Huchberger v. Ins. Co.*, 12 Fed. Cases 793), it was held that the sixty days ran from filing proofs, not from the conclusion of an examination; and in *Kansas* (*Ins. Co. v. McLead*, 57 Kansas, 95), the time was held to run from filing proofs, not from the production of vouchers demanded, and in *New Jersey* (*Ins. Co. v. Gibbs*, 56 N. J. L., 579) it was held that suit could be commenced at the expiration of sixty days after furnishing formal proofs, notwithstanding that that period had not elapsed from the time of furnishing a magistrate's certificate. We must keep in mind, however, what has already been said above that there are decisions in some of the States that a "disagreement"

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as to the amount of the loss makes the appraisal condition operative and a condition precedent to any action on the policy without any specific requirement for appraisal on the part of the company (*Murphy v. Insurance Company*, 61 Mo. App. 323; *Ins. Co. v. Erie Brewing Co.*, 30 Ohio Circuit Court 309).

The proofs of loss must, of course, be satisfactory in the sense that they are a substantial compliance with the policy conditions, and if those furnished are clearly defective and are rejected, the sixty day period would, naturally, run from the furnishing of proper proofs.

Kimball v. Ins. Co. (21 N. Y., Superior Ct., 495), where it was said by Hoffman, J., at page 501:

If the defect in the preliminary proofs furnished the 19th of November, was not waived, then the action ought not to have been commenced until the 21st of March, 1858. The question is of moment.

To the same effect are: *Ins. Co. v. Hocking*, 115 Pa., 398; *Marino v. Ins. Co.*, 227 Pa., 120.

It is hardly necessary to add that a denial of liability would of course waive the sixty day limitation and suit would be at once sustainable.

THE 12 MONTHS LIMITATION.

We have now reached that provision of the policy which is the one remaining of the subject under discussion in this chapter, where it is provided that no suit shall be sustainable unless commenced within twelve months after the fire, and it may be said that there is no ambiguity in that language. It has been strictly construed by the courts and unless the company has extended the time limited, or done something to estop itself from asserting it, the right of action is absolutely gone at the end of the period, except in the one case which is provided for by statute in New York State (Code Civil Procedure, Sec. 405) extending the time for another twelve months where action has been brought within the time limited but the action has terminated other than by voluntary discontinuance, dismissal for neglect to prosecute or a final judgment on the merits or a reversal on appeal where no new trial is awarded. It was at one time questioned whether the limitation in the policy was affected by this code provision but was settled in the case of *Bellinger v. Ins. Co.* (51 Misc., 463, *affd.* 113 A. D., 917), where it was held that the section did apply to the policy limitation.

The time begins to run from the day on which the fire occurred, and it may happen that when an appraisal award is not made until after the expiration of the period a suit will be sustained.

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In *Austen v. Ins. Co.* (16 App. Div., 86), a suit brought within a month after an award and more than twelve months from the fire, was held timely; the delay, it was said, being due to dilatory action on the part of the appraisers. And in *Williams v. Ins. Co.* (90 App. Div., 413) a similar action was sustained.

There are cases (*Smith v. Glens Falls Ins. Co.*, 62 N. Y., 85; *Ins. Co. v. Hatton*, 55 S. W., 681) holding that where a compromise agreement fixing the loss has been entered into and a promise of payment made the policy limitation would not apply. These cases have no application to the usual agreement fixing the loss subject to the terms of the policy, which is of course controlled by the policy limitation (*Steinberg v. Boston Ins. Co.*, 144 App. Div., 110; *Stuart v. Reserve Fund Ass'n*, 78 Hun. 191).

Another statutory provision in this state that must be considered with the question under discussion is that contained in our Code Civil Procedure, (Sec. 399), which makes delivery of process for service to a Sheriff within the time limited and service within sixty days after the time limited an "attempt" to begin an action and a sufficient compliance. This statute has been held to apply to an action on an insurance policy. (*Hamilton v. Ins. Co.*, 156 N. Y., 327).

When the company elects to rebuild under the policy provisions it is said that it thereby enters into a new contract, a building contract (*Morrell v. Ins. Co.*, 33 N. Y., 429; *Wynkoop v. Ins. Co.*, 91 N. Y., 478; *Heilmann v. Ins. Co.*, 75 N. Y., 7) and in an action brought to recover for breach of such a contract, it was held by the Court of Appeals of the District of Columbia (*Winston v. Ins. Co.*, 32 App. Cases, D. C., 61) that the twelve months' limitation contained in the policy which was substantially similar to that in the standard form had no application.

The company may, of course, extend the time or waive the time limitation (*Magner v. Mutual Life Ins. Co.*, 17 App. Div., 13; 162 N. Y., 657).

There remains one important question which requires critical analysis, and that is the effect of this time limitation when an interest other than that of the insured is also covered. Such interests we know are to be the subject of other chapters and I might simply state that the Court of Appeals has by inference at least said that it has no application to a mortgagee under a Standard Mortgagee Clause (*Heilbrunn v. Ins. Co.*, 202 N. Y., 610). It may be of interest to note, however, that this Court in the case of *Mc-*

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Ardle v. Ins. Co. (183 N. Y., 368) where payment had been made to the insured notwithstanding a loss payable clause to another as "interest may appear" held that suit by the person to whom the loss was payable was not sustainable under the policy limitation, for the reason that it was commenced more than twelve months after the fire.

XVIII

THE APPRAISAL

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Twenty-one years ago last September, when I was a special agent and adjuster in the Central West, I wrote a paper on "The Conduct of an Appraisal" for the 1893 Meeting of the Fire Underwriters' Association of the North-West, at Chicago. The pamphlet edition of the paper is about out of print, and it would therefore be quite safe to crib freely from that early publication in the preparation of the present paper, and I have not hesitated to consult it with that end in view. For one reason or another, however, it has seemed best to do the work over again to a considerable extent.

My study of the older production has been rather interesting, for this reason: In 1893 the Standard Policy had been in use only half-a-dozen years, even in New York, and of course for a shorter time in any other State. The analysis then made of its provisions as applied to appraisals was therefore based chiefly on decisions made under older policy forms and on my own best guess at the decisions likely to be made under the new features of the new form. Yet on re-reading the paper today I find scarcely a point on which I am disposed to modify the opinion I then expressed. This is not so much because the courts have agreed to follow my reasoning as because they have continued to disagree on the points that were then in doubt, and so left me free to adhere to my own views. At that time I made a prefatory remark that I can still safely repeat, viz.:

So far as the present paper touches on the law of the insurance appraisal, it must be understood to be the production of one who believes that as to many branches of the topic there is no settled law at all.

And I do not mean today to devote much time to analyzing and balancing—"distinguishing," our lawyer friends would say—the controlling or conflicting court precedents applicable to the several heads of my subject, preferring to state my own conclusions from my study of the cases, and merely to indicate where it seems neces-

*This chapter, having been written in 1914, deals with the New York Standard Policy of that time and has not been modified to fit the differing phraseology of the New York Standard Policy which came into use January 1, 1918.—The Author.

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sary which of those conclusions are based on concurrent, which on non-concurrent, and which on wholly missing court decisions.

The language of the New York Standard form of policy, so far as it touches the subject of appraisal, is as follows:

Lines 1-6, after stating cash value basis of ascertaining loss, say: "Said ascertainment or estimate shall be made by the insured, or, if they differ, then by appraisers, as hereinafter provided * * *. It shall be optional * * with this company to take all, or any part, of the articles at such ascertained or appraised value, and also repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time, on giving notice, within thirty days after the receipt of proof hereinrequired, of its intention so to do; but there can be no abandonment to this company of the property described."

Lines 86-95. "In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the appraisal and umpire.

This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required."

The first thing to be said about the general provision of the Standard Policy for an appraisal to determine the amount of loss, in case of disagreement, is that it is, by the unanimous holding of the courts, a valid and enforceable one, and would be so adjudged even in a State where the use of this form of policy is not required by law, but is purely voluntary. The old jealousy of the lawyers and judges lest such a provision for settling out of court might, as they called it, "oust the courts of their jurisdiction" had some years before the Standard Policy was drafted ceased to prevent a fire insurance appraisal award, reached in due form, from being conclusive, where these two conditions were observed: first, that only the amount of the loss, not any question of liability or policy construction, was submitted to the appraisers, and second, that the appraisal award, in case of disagreement, was expressly made a condition precedent to the right of recovery at law. It was my fortune to be personally involved, as an adjuster, in one of the cases that went to the Supreme Court of the United States from the pre-Standard Policy days and helped to fix the law in this respect (*Hamilton vs. the Liverpool & London & Globe Ins. Co.* 136 U. S. 242). In the

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loss underlying this litigation—that of the “Bull Dog Tobacco Works” in Covington, Ky.—policies of widely differing forms were involved, and some appraisal provisions were held good and others not. Fortunately that is a state of things long outgrown.

In one respect the Standard Policy is weaker than some forms that immediately preceded it. It does not, as they did, make appraisal a separate and specific “condition precedent,” but includes it with other requirements. “No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the assured with all the foregoing requirements.” (Lines 106 and 107). It was a Minnesota court, I think, that first determined that this made no difference, and that is now the universal doctrine. The holder of such a policy who should, after a loss and after a disagreement with the company’s representative as to the amount of such loss, refuse, when requested, to submit the determination of that amount to appraisal, as provided in the policy, would forfeit his right of recovery, though, of course, such forfeiture might afterward be waived by acts of the company. What would be the effect if, after first refusing an appraisal, the insured afterward repented and offered or requested one, would probably depend on whether the refusal had prejudiced the company, or the delay made appraisal more difficult or disadvantageous to it. But the company, on its part, can not refuse appraisal, and then afterward require it and treat failure to comply as a bar to action; that is, of course, supposing a disagreement had already occurred when the first demand was made.

It is by no means certain that the insured would be relieved from the necessity of an appraisal merely by the company’s failure to demand it. The policy does not provide for an appraisal only on demand (written or otherwise), but absolutely requires that method of adjustment, in case of disagreement, and this requirement must be complied with as fully as any other. In lines 93-95, to be sure, it is stipulated that “the loss shall not become payable until * * * after * * * satisfactory proof of the loss herein required [has] been received by this company, including an award by appraisers when appraisal has been required.” But even here “required” may as easily mean “required by the happening of a disagreement” as “required by this company;” and in any case this whole provision for proofs of loss could be waived without waiving the right to an appraisal. It is primarily the concern of the insured to see that an appraisal is had in case of disagreement, in order that he may not

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lose his standing in court. A good many cases to the contrary can be cited, but in all of them "request" appears to have been a policy condition for appraisal. At the same time, no careful adjuster, I suppose, whether he wanted an appraisal, or the benefit of the insured's refusal of one, would stop short of explicitly requiring it, and without unreasonable delay after the disagreement arose, and in writing if necessary.

Another thing tolerably clear also is that the right to an appraisal is not, under this contract, enforceable only after the making of proofs, as used to be the case, but arises as soon as a disagreement occurs, whether that be before or after proofs are furnished. The party seeking appraisal should make it clear as a matter of record that a disagreement has actually arisen, to make his demand operative.

But there are some kinds of disagreement as to amount of loss which will not sustain a demand for appraisal at all. If the only question, for example, is, which of the two standards, market value or cost of production, is the measure of loss, or in other words, what the expression "actual cash value" means, such a difference does not call for appraisal. So of a disagreement as to the intent of the stipulation that "the loss * * * shall in no case exceed what it would then cost the insured to repair or replace," where "then" might mean just before or just after the fire with a great difference in its effect on the amount of the claim: any such disagreement would have to be settled otherwise than by the sort of appraisal called for in the policy.

The demand for an appraisal on the part of the company does not involve an admission of liability under the policy, nor need such an admission be made in order to enforce the demand. The company has a right to an appraisal before electing what to do with reference to any known or suspected forfeiture. The contrary holding in some early cases was under a different policy provision on the subject.

In this whole matter of the demand for an appraisal, one thing must not be forgotten, and that is, that if demand is made at all, it must be made in accordance with the terms of the policy, not otherwise. It should not, for instance, be coupled with a demand that any particular form of agreement for submission be signed, even if that form be in strict accordance with the policy provisions, nor with a demand that any particular form of evidence should be submitted to the appraisers. The plaintiff in the case

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of *Hamilton v. Liverpool & London & Globe Ins. Co.*, just referred to, really lost his case because he insisted on a provision in advance that after the appraisers had examined the tobacco alleged to be damaged by smoke he should have the right to sell this tobacco at auction, or "on the breaks," as it is called, with a notice to purchasers of the previous exposure of the tobacco to smoke damage, and introduce before the appraisers the evidence of the price thus obtained. It is just possible he could have done all this if he had not stipulated for it in advance outside the language of the policy, but no additional contract can be forced upon either the company or the policy-holder in this connection. They have the duty of selecting appraisers, and they may do that without naming them in writing at all, so far as policy requirements go. The award must be in writing, but the nomination of appraisers need not be. Convenience rather requires some written evidence of these nominations, and ordinarily there is no difficulty in getting an agreement signed, if the appraisal is consented to at all, but the demand for appraisal should not include demand for any such signature as a right. So, a joint demand for appraisal by several companies jointly interested in a loss is not wise, even if the policy terms of all agree. No one of the companies has any right to a joint appraisal, even though such an appraisal, if consented to, would probably be valid. This brings into view a defect of this policy form which it shares with older forms. While limiting the liability of the company to its pro rata share of the loss, as distributed over all the insurance on the property, no provision whatever is made for common action in adjustment. Doubtless a man could be compelled to have as many appraisals as he held policies, and on his part he could compel each company to have its separate appraisal. So also each company reserves the right to replace, and the right to take any part of the damaged property at its ascertained or appraised value, and in case of insurance by more than one company these several rights of the several companies are clearly conflicting. This is one of the incongruities of the contract that only common sense and sweet reasonableness on the part of insurers and insured can prevent from becoming wholly absurd.

The policy does not provide for several different appraisals on different subjects of insurance. Where the property is insured in separate items, there is little doubt that a disagreement as to loss on any one item will support a demand for appraisal on it, though a refusal of such a demand by the insured would not bar his right of

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action under other items of the policy, if he abandoned claim for the item in question. But the case of the blanket policy, common where full co-insurance is required, and covering in one item building, machinery and stock, might be troublesome. It is doubtful whether a valid demand for appraisal could be made on only one portion of the property so insured, unless the loss on the rest were already agreed on, so that the appraisal would really conclude or "ascertain" the loss. And if more than one portion, as building and machinery, were in dispute, it might be unsafe to plant oneself on a demand for separate appraisals, and wiser to request simply an appraisal to ascertain the loss, as provided in the policy. Appraisal once granted, there is usually little difficulty in getting as many separate submissions as convenience and the nature of the loss require; and such separate appraisals, their awards aggregating the whole amount of the loss, would doubtless be valid. But a good many variations from policy requirements, in the way of details added or omitted or varied, might, if agreed to, be permissible in the conduct of an appraisal which yet could not be safely insisted on by either party in making a formal demand under the contract.

There is no longer any doubt, though there still was when my 1893 paper was written, that an appraisal can be demanded, as a means of ascertaining the whole loss, where the loss is total, or where part of the insured property is destroyed, and part damaged, as well as where only the amount of damage to property saved is in dispute. The older court decisions inclined to hold that in case of total destruction, especially of merchandise, there was nothing to appraise, though except in valued-policy law States they usually upheld building loss appraisals, even where the destruction was complete. But all authorities now agree that the Standard policy provision for an appraisal of the loss does not mean merely an appraisal of damage to property in sight.

So much for the circumstances, and for the manner, in which an appraisal may be demanded. The next thing to consider is the form of the agreement or submission. I have just noted that no written agreement is really necessary, or provided for by the policy, and that not even the nomination of appraisers is specifically required to be made in writing. But usually both parties prefer such an agreement in writing, as providing evidence of the nominations made, as describing for the guidance of the appraisers the property on which the loss is to be appraised, and as furnishing blanks for recording the

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choice of an umpire and making the return of the award, the last of which alone is required by the policy itself to be in writing.

The form of agreement should not contain any form of statement by either the appraisers or the umpire as to their qualifications (or lack of disqualifications), or any declaration or affidavit as to their purpose to conduct the appraisal properly. The first of these points is wholly for the nominating parties to assume responsibility for, and the second is an impertinence and a supererogation.

As a matter of fact, I do not mean to draft and submit to you here an ideal form of appraisal agreement. I did so, I believe in my 1893 paper, but there is no evidence that any one ever used it, and since that time a good many quite satisfactory forms, copyrighted and uncopyrighted, have been put in circulation. I have but this admonition, that the agreement should be as nearly as possible the policy, the whole policy, and nothing but the policy, so far as the latter is an instruction for appraisers, making allowance only for the necessity of putting it into contract form. Incidentally, I think I should always quote in the agreement the clause giving the company the right to take the whole or any part of the property at appraised value, because, strangely enough, it is the only one in the policy that even implies that an appraisal should be made in detail rather than in bulk.

How shall this agreement be signed? As to the insurance companies, signature by their representatives is rarely a matter of dispute. A company's name signed by one not specifically authorized to act for it would not give the insured ground for declaring an award not binding, if the action of the signer were ratified by the company afterward; since the fact that it would not have bound the company had it chosen not to ratify does not release the other party. A company not signed for is of course not bound by the award, nor is the insured as to such company. The signature by or for the insured is, of course, subject to the ordinary law of evidence and authorization, as to the binding force of the signature of an officer for a corporation or of a member for a firm, etc.

At this point in my 1893 paper I recall that I discussed the question whether a mortgagee or other payee is bound by the result of an appraisal to which he has not been a party, and whether his signature and participation are proper and necessary in an appraisal under a policy held by him. At that time I held that the provision of lines 56-59 allowing of the endorsement of a mortgagee's or like interest draws so clear a distinction between the terms "mortgagee"

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and "insured" that the later requirement that the insured shall select an appraiser leaves the mortgagee out. Then I added, with that fine premonitory sense of danger that stands out so clearly in all my earlier writings on insurance,—“at the same time it is best, until the lawyers have had their final hearing on this question, to secure the signature of the payee as well as of the insured to an appraisal agreement.” Well, a lot of water has flowed over the dam since then. A couple of years ago the Court of Appeals of New York, in the case of *Heilbrun vs. The German Alliance Insurance Company*, had a mortgagee-clause payee suing to recover where the insured had made no proofs and where the year limit had elapsed before suit was entered; and it practically held that no standard policy provision governing the adjustment of the loss applies or can be made to apply to the mortgagee save those contained in the standard mortgagee clause, which is to all intents and purposes an independent contract.

Now as to the appraisers. The policy specifies only two necessary qualifications in an appraiser: he must be “competent” and “disinterested.” “Competent” means qualified, fit, capable. Whether a man is competent or not depends on what he has to do. An appraiser has to appraise, and “appraise” means to fix the value, or, in the case of a loss, to fix the amount of it. The word “arbitrate” does not occur in the New York standard form of policy at all. It is always “appraise,” “appraiser,” “appraisal.” A man might be a competent arbitrator for an arbitration at common law or under any general statute, and yet not be a competent appraiser of a fire loss, under the terms of our policy form. The latter office undoubtedly requires some special knowledge of the subject to be considered. In practice, a considerable liberality must be shown in objecting to a nominee on the ground of lack of competence, and if an imperfectly qualified appraiser were accepted with a knowledge of his limitations the award could not afterward be challenged because of his incompetence. But there is little doubt that a man having no knowledge whatever of his own about the sort of loss he is selected to appraise could for that reason be successfully objected to in the outset, or if accepted in ignorance of the facts, his award set aside.

But the appraiser must also be “disinterested.” That means, among other things, that he must have no interest in the property destroyed or damaged, nor in the sum to be paid on account of the loss. Probably an ordinary creditor could not be objected to, if nominated by the insured as appraiser, unless his chance of recov-

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ering his debt depended in a measure on the amount to be paid the insured by the company. A mortgagee or garnisher would hardly be eligible. A relative might or might not, according as the relationship did or did not imply "interest." An appraiser the size of whose fee depended upon that of the award would not be "disinterested." But "disinterested" also means, in a measure, not biased or prejudiced. It would not be admissible for either party to insist on selecting as appraiser a person known to be strongly prejudiced against the other party. Conversely, a person whose relation to the party selecting him was such (as for instance that of clerk or employe) that he could not but be presumed to be biased in his favor, would not be a proper appraiser.

This brings us to the consideration of the so-called "professional appraiser"—the man who has appraised a good many losses by fire, usually, though not always, for insurance companies, and who devotes a considerable portion of his time to that work. Is he a proper appraiser, "competent and "disinterested?" Competent he usually is. His very existence as a type is due to a demand for special competence. A good many fire losses require for their proper adjustment, whether by appraisal or otherwise, not so much a knowledge of materials and prices as a knowledge of the effects of fire, and the possibility and expense of removing them or repairing the damage so caused. And it is idle to say that experience does not add to one's competence to judge of such matters. Not every builder able to figure the new cost of a building is a good judge of the extent of damage to it by an irregular and obstinate fire. He must have had special experience to estimate correctly such a loss. So with the machinist, the manufacturer, the merchant. Each may be a good judge of construction or prices in his specialty without having much knowledge of fire or water damage to the goods he makes or handles. On the score of competence, therefore, the professional appraiser has unusual claims to consideration. He should be qualified, not disqualified, by his experience. But is he disinterested, and so eligible? That appears to be a question of fact, not one of law. The mere circumstance that he has appraised many losses previously, even if a good share of them were for the same company, should not of itself disqualify him. If that fact were frankly stated in the outset, and he proved his disinterestedness, his lack of bias or prejudice, by his conduct in the appraisal, no objection could lie against him or his award. But if an adjuster misrepresented him as wholly disinterested, concealing the fact of his

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frequent service as appraiser, and subsequently his conduct proved to be, in fact, that of a prejudiced person, or probably, if the insured could fortify his objection by evidence of an habitual display of prejudice by the appraiser in previous cases, the nomination could be rejected or the award set aside as the case might be.

In a recent case decided by the Appellate Term of the Supreme Court in this State it was held that where the company nominated an appraiser who was not, in fact, wholly disinterested the insured was not obliged to object to the nomination or call the attention of the company to the disqualification, but might ignore entirely the nomination and the demand for an appraisal and sue on his policy. This decision, which had the additional defect of seeming to affirm the wholly unsound doctrine that previous service in appraisals for the same company is in itself a disqualification, is not likely to be relied upon as a precedent.

The Massachusetts Standard policy provides that the company and the insured shall each choose one "referee" (as an appraiser is therein designated) out of three to be named by the other, the two so chosen to select a third, but that no person shall be chosen or act as referee against the objection of either party who has acted in a like capacity within four months.

The appraisers once chosen, their first duty is the selection of an umpire, and it is never wise, perhaps never legally safe, so to vary the submission as to allow of a postponement of this selection until the umpire's services are needed, instead of requiring it, as the policy does, at the outset.

The qualifications of the umpire are defined in the same words as those of the appraiser; he must be "competent and disinterested," and an award participated in by him could be set aside for his proven lack of either qualification, unless the objecting party were estopped by having allowed the appraisal to go on after knowledge of such defect came to him.

Under the rider clause imposed in this State by the act of 1912 the duty of selecting an umpire devolves on any Court of record in the country in which the property is located, in case the two appraisers shall have failed or neglected, for ten days after both have been chosen, to agree upon and select an umpire, provided either the insured or the company applies for such court action. And I see no reason to doubt that if the Court nominated as umpire a person who could be shown to be either incompetent or interested, the nomi-

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nation could be objected to or the award set aside, just as if the appraisers and not the Court had made the blunder.

The interruption of an appraisal by the withdrawal of either appraiser would not excuse either of the two contracting parties (unless the withdrawal were directed or caused by the other), from the duty of having another appraisal, though of course the one then under way could not be completed. The withdrawal of an umpire would probably only require his replacement by another, even if considerable progress had been made in the appraisal, and he had participated in it, before such withdrawal; but it might be wise to re-submit all matters of difference to the new umpire unless the former one had left some evidence of his decision on points brought before him.

Whether the insured or the company can withdraw from or revoke an appraisal once agreed on, and, if so, with what effect on the respective rights of the parties, is an interesting question. Doubtless either can do so, and in order to avoid an estoppel should do so, whenever he becomes aware of such a fault in the qualification or conduct of an appraiser as would render an award invalid. But this would not excuse him from using his endeavors to procure another submission, unless the other party were to blame for the miscarriage of the first, which would usually be hard to prove. Doubtless, also, either party, without any cause whatever, can at any time before the award is rendered, withdraw from the appraisal and so prevent the award itself, even if afterward completed, from having any binding force. But in that case he would irretrievably lose his right under the policy, whether of recovery or defence, unless the other party afterward waived the forfeiture by some act of his own. The policy requirement is not merely for consent to an appraisal, but for the actual and completed ascertainment of the loss by that method. And to prevent the consummation of an appraisal is, in its effect, precisely the same as to decline it *in initio*. Cases in which the submission was held revocable at will, without penalty or forfeiture, or at the risk only of a suit for damages, do not, I think, apply to the New York standard form of policy.

When they have begun their work of estimating and appraising the loss, the appraisers have very large powers indeed. The policy itself has but two stipulations, that they shall state separately sound value and damage, and that, failing to agree, they shall submit their differences to the umpire; and these two stipulations should neither be ignored nor modified. But the precise way in which they shall proceed with their task is not prescribed by the policy, nor will the

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courts set any narrow limits to their discretion and powers. They are not bound by the rules of evidence followed in courts of law or in ordinary arbitrations either at common law or under general statutes. They can judge for themselves what testimony is necessary for their guidance. Of course reasonable discretion must be used. The rejection and exclusion of clearly pertinent and material testimony or evidence would probably endanger an award. An appraiser who, when the proper determination of the loss required a personal examination, made no such examination, but relied on bills, books, or inventories alone, would be guilty of misconduct avoiding an award. Doubtless, also, in case a portion or all of the property were entirely destroyed, the appraisers could not safely refuse to consider the evidence of bills, inventories, and the like, though they could judge for themselves of the weight of such evidence, taken in connection with the other evidence at hand. Looking at the ashes alone would not be a sufficient effort to "ascertain or estimate" the loss on destructible property. But if, for example, the property were wheat in an elevator, and the appraisers, either from their own knowledge or by inquiry of experts, were satisfied that the fire would not have reduced the bulk of a burned pile of wheat, even while destroying its value, they might refuse to consider any outside testimony as to amounts, and rely wholly on the evidence of the debris.

The appraisal may be in detail or in bulk, so far as the contract is concerned, except in so far as details may be necessary because of the reserved option of the company to take "any part" of the damaged property at its appraised value. The policy, while providing for the furnishing of an inventory by the insured to the company after the fire, does not make such an inventory a part of the submission to appraisers. But the latter can require any such schedules, inventories, or specifications, as the case admits of to be prepared and furnished them. They can also, if the case admits of that, make their own schedules and ignore those furnished them. If there were any express understanding that the schedules furnished by the insured were accepted and agreed upon by both parties as correct in respect of kind and quality, and the only question were of damage, items could not safely be added to or cut out from the schedules; but otherwise, the appraisers, on satisfactory and reasonable evidence, might find that some items had not been in existence, and so cut them out, or that they had been omitted, and so add them to the schedules.

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But some things they can not do. They can not decide what items in the schedule are, and what are not, covered by the policy. That must be done by the parties themselves, either before or after the appraisal, preferably, though not necessarily, before, or at least before the award. A machinist may think he knows what the word "tool" means, but as an appraiser he can not pass on that question conclusively; a builder's opinion as to whether a furnace is part of a dwelling may be valuable, but it is not decisive in an appraisal. Some other points not suitable for submission, and so not determinable by appraisers, have already been referred to, as whether cost or market price shall prevail, if the two are different, etc. Errors of judgment within their province as appraisers will not invalidate or disturb an award, but errors of law or policy construction would require correction, though probably not the entire abandonment of the award.

Schedules, whether furnished by the insured or not, should where practicable be returned by the appraisers in detail with their award, a copy going to each party. And besides being arranged in columns for "sound value" and "damage," the items should be so grouped that the appraisers can append their names to the footings of the amounts they have agreed on, and the umpire, with or without either or both the others, sign a separate list of findings on items of difference submitted to him. This is not specifically required by the policy, but is the fullest, fairest and best form of award possible. Undoubtedly both parties have an equitable right to know the result of the appraisal in such detail as will enable them to correct clerical errors, dispose of any question of disputed liability on particular items, and assure themselves that their joint instructions have been followed.

These signed schedules will be a sufficient award, but for completeness they should be attached to the submission agreement and at the bottom of the latter a formal award signed.

If, after an award were completed, either party should specify items where, from ignorance or accident, the appraisers had, in his belief, seriously erred, it would be the course of equity, though not of legal necessity, to allow them to consider the items again, in the light of any new information furnished, and if they found in this reconsideration reason for changing the total footings reached, to permit that to be done. But if they adhered to their original conclusion, it could hardly be asked that any other *ex parte* evidence should be allowed to affect the result of an appraisal so had.

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The option to take at its appraised sound value the whole or any part of the property damaged, instead of paying the amount of loss thereon as fixed by the appraisers, is a valid option, but in one case in this State the right to repair, rebuild or replace with property of like kind and quality has been held to be waived by entering into an appraisal. I question the soundness of that holding.

So far we have been considering, and may now be deemed to have practically traversed, the legal and formal aspects of an appraisal under a fire insurance policy. But there are also involved some questions of policy, expediency, tact, manners and other minor morals, that require some separate discussion. It is a pretty clear teaching of adjustment experience that an appraisal should by no means be had merely because it can be had under the policy. In very many cases it is better to get along without it. The demand for an appraisal, especially in the country or small town, is often viewed as a technicality, and for this reason it is a provision that should not be overworked, but left for real emergencies, as is the intention of the contract. In losses on personal property, and especially on stocks of goods, the question when to appraise calls for the best judgment of the adjuster about as often as any one problem of his office. I suppose adjusters generally think that more appraisals are made necessary by the intractability of claimants than by the nature of the property or the character of the damage to it. But intractability is a relative fault, and may be due to a correlative incapacity in the adjuster. Tact, frankness, dispassionateness, and an evident desire to deal fairly, on the part of the company's representative, often furnish a cheap and valuable substitute for a hard-fought, catch-as-catch-can appraisal. Often, but not always. There are claimants on whom all the Christian virtues, though displayed in full panoply, are without effect. And these should have the coldly legal appraisal award as their lot and portion forevermore.

Where the loss is upon an unusual kind of property, whose susceptibility to damage is a matter of expert knowledge only, a guessing match with the insured is likely to be unsatisfactory, and appraisal the better course. There are things even adjusters do not know, and I am not sure but that they err nearly as often in not appraising certain stock and machinery losses, of which they can have but little knowledge of their own, as they do in unnecessarily appraising the plainer sort of building losses. The adjuster who settles his own losses on his own knowledge and enlightened judgment does well; but the habitual "lump settlement" adjuster in the

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long run does ill, because he doesn't know what his "lumps" contain, and that is something it commonly pays to find out.

What is true of the need of discretion in determining when to have and when to avoid an appraisal is true of it in still greater degree in connection with the choice of an appraiser and the instructions given him for the conduct of the appraisal. Perhaps there are few more difficult questions propounded to the adjuster, especially to the adjuster operating most of the time in villages and small towns, than the frequently recurring question whether to use a local and presumably more or less inexperienced appraiser or to send away for a more competent man who will almost certainly be received with suspicion by the assured and his appraiser. I have answered that question both ways in my time and have been both pleasantly and unpleasantly surprised by the outcome of each method of treatment. Good guessing and good judgment are both needed here. Something depends on the character of the loss, something on the character of the assured, and a great deal on the character of the appraisers between whom one must choose.

In a city like New York of course the choice of an appraiser or umpire, like that of a juryman, is a wholly different matter from the same choice in a rural community. Here everybody is prepared to do business with strangers and is ready to accept as an appraiser even the man he has lived next door to for thirty years without speaking to him, and whom he had always supposed to be a moving picture actor instead of a merchandise expert.

The appraiser must never be allowed, much less led, to forget that he is a judge, not an advocate. When an appraiser begins to say "we" in talking of the insurance companies who employ him, or to act habitually as an agent and advocate instead of an appraiser; when he has the habit of calling himself an adjuster, and of boasting of his exploits in cutting down claims, he should be chloroformed and retired from active service at once. This frame of mind is usually produced in the appraiser by his contact with a certain class of adjusters rather than by his own viciousness. And it is to such adjusters and such appraisers that we owe a good share of the hostile and sometimes absurd legislation with which insurance companies are from time to time favored. The whole procedure for the adjustment of losses, as provided for in the Standard Policy, is a branch of the general administration of justice between man and man, and no part of that procedure so nearly resembles the most dig-

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nified of courts—the court of equity—as the appraisal. And this essential character should never be belied either by its constitution or by its conduct.

An appraisal which both in form and in spirit has been conducted within the lines we have been following will pretty surely meet St. Paul's test of a good Christian: "Having done all, to stand." And an appraisal that departs at all widely from these lines will not stand—ought not to stand. The best award is a fair award; any other is a bad award: worse, almost surely worse, in the long run, for the apparent gainer than for the apparent loser by it.

XIX

ADJUSTMENT OF BUILDING LOSSES

WILLIAM R. FREEMAN

The Hon. Frank Hasbrouck, Superintendent of Insurance of the State of New York, in a recent address said:

"Among the people in general there is an abject (dishheartening) ignorance of insurance principles and purposes."

There are very few of those who have fire losses who know very much, if anything, about the policy contract and, not having read the policy conditions, they do not realize or fully understand what "indemnity" means and so when a fire loss occurs they neglect their first duty, which is to protect the property from further damage as far as possible. They not uncommonly refer the adjustment of the claim to a public adjuster or some other third party and rely upon them to take care of their claim for them instead of notifying and dealing directly with the insurance company. The lack of personal contact between insured and insurer is doubtless the prime cause for the seeming lack of confidence in the companies.

A claimant may be ignorant of his rights under the policy, but he need have no fear for, in the hands of an honorable adjuster representing an honorable company, he will be perfectly secure in obtaining them. The motto "Do unto others as you would have them do unto you" should always be the actuating motive of every adjuster.

In building losses as in other losses there are dishonest claimants who have a peculiar code of morality, which holds that trying to get all one can out of an insurance company is not really unmoral and is quite permissible.

It has been said: "Public sentiment is to the effect that the man who has a fire from any cause whatever, should loot, to the extent that he is able, the treasury of the insurance company protecting him."

In some instances it has been found that an insured procured an estimate of the loss for his own information which was not to be shown to the company's representative, and obtained another for an exaggerated amount to be presented to the company's adjuster.

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I have a photograph of a letter from a claimant, requesting a builder to "rise his figures from \$2,560.00 to \$3,560.00" and to get another builder to "rise his figures from \$2,560 to \$3,650" as "then they would be O. K."

Some few claimants will not or do not want to understand that the insurance contract is one of indemnity and not of profit; apparently restrain their consciences, try to get all they can, claim loss of rent, interruption of tenant's business by elevator service being stopped, pay of a watchman after a fire, and other consequential losses not covered by the policy, as well as the cost of repairs needed but not the result of the fire.

In tenement houses where the bells have not been in use for a long time and, in some cases, where the directory at the door was damaged or torn away before the fire, claim is made not infrequently for repairs or for the replacing of the entire system. If such claims are made intentionally they are, of course, dishonest, the damage not being the result of a fire.

Cases have been known where a landlord leases a building for a term of years, the lessee to make all repairs which he neglects to do. A fire occurs and the owner not uncommonly leaves the matter of adjustment in the hands of the lessee for adjustment and the lessee, or tenant, puts in a claim for redecorating or repairing of the entire building, thinking to have this work done (which he should have had done himself) at the expense of the insurance companies.

Not many, however, who are so unfortunate as to have a fire loss belong to the doubtful or dishonest class. I am glad to say that the majority of claimants are honest and, as such, are entitled to fair and honorable dealing.

One must bear in mind that it is but human nature to value one's own possessions more highly than those of another and that it is fair to assume that it is not necessarily evidence of a dishonest motive when a claimant presents figures for his loss which are greatly in excess of those that the adjuster of the company has in mind. To the claimant his home was his palace and in his honest opinion no "cash value at the time of the fire" or "cost of repairs" can replace the old home or put it back as it was before the fire.

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It is such a situation as this, where tact and diplomacy are required; that brings out the genius of the real adjuster in order that a settlement satisfactory to the insured and equitable to the company may be obtained.

To treat a claimant properly, even though his demands may be unreasonable, is as important in the adjustment of a fire claim as the ability of an adjuster to estimate the amount of loss.

The real adjuster must combine the happy faculty of being able to estimate accurately the measure of damage and at the same time convince the insured of the adequacy and accuracy of the figures which are being offered in settlement of a loss.

In construing the policy contract, always give it its broadest meaning for it must be remembered the Courts have ruled that "The policy although of standard form was prepared by the insurers who are presumed to have had their own interests primarily in view and hence when the meaning is doubtful it should be construed most favorably to the insured who had nothing to do with the preparation thereof."

A fire insurance contract is essentially a contract of indemnity, the insurers undertaking to indemnify an insured for all direct loss or damage by fire to the property specified and, as such, it entitles the company to deduct from original or new cost for any depreciation, since the purpose to be accomplished is not profit but reinstatement as at the time of the fire.

If there be a salvage let it come as a result, not as an object of settlement. The sharp adjustment of an honest claim is the poorest investment an adjuster can make for himself or for the company he represents.

The company is not liable under a building policy for trade fixtures installed by a tenant or a lessee which are removable, but where a lessee has substituted larger glass in show windows and has redecorated the building or has altered counters, shelving and lighting fixtures which are of a permanent character and not removable upon the termination of tenancy, but are to revert to the owner of the building, these are not to be considered as removable trade fixtures as, unless there is an agreement to the contrary, ownership rests in the building owner from the moment that such improvements are affixed to the realty.

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Unless specifically excluded from cover, the cost of excavations and foundations of a building must be taken into consideration when obtaining the sound value of it and damage to these by fire is covered under the fire insurance contract, subject to any application of the coinsurance or average clause, if such a clause appears in the policy.

There are several "foundation exclusion" clauses in use in various parts of the country which are intended to exclude foundations and cost of excavations from the coverage of the policy.

The New York Fire Exchange clause excludes "cost of excavations and foundations of building below the level of the ground."

The Philadelphia clause excludes "foundations of building below the ground or street level."

While in some cities a clause is used which excludes "foundations which are below the surface of the ground."

The building code of the City of New York reads:

"Foundation walls shall be construed to include all walls and piers built below the curb level or the nearest tier of beams to the curb which serve as supports for walls, piers, columns or other structural parts of building or structure."

Although these clauses vary in their wording, the intent is the same.

In some of the western forms excavations and foundations "below the under surface of the lowest basement floor" are excluded, in which event all above the lowest basement floor would actually come under the cover of the policy for estimate as to sound value and loss.

In cases where the extent of the damage by fire necessitates the employment of an architect to draw up plans and specifications for filing with the Building Department and for supervision, the cost of such architect's fee is a proper charge to be added to the estimate of the actual work of rebuilding or repairing.

Claim is frequently made for architect's fees both in small and large losses. These are certainly uncalled for in minor losses. It would seem that unless such fees are especially provided for in the policy forms, they are not a liability of the insurers, and if allowed, the adjuster should be satisfied that an architect is to be actually employed and paid.

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Unless specifically mentioned in the form attached to the policy contract, fences, yard fixtures and outhouses are not covered under a building policy.

When fences are covered by specific mention, it must be borne in mind that insured has probably but a part ownership in same. By reference to the revised ordinances of the City of New York, it is noted that:

"All partition fences shall be maintained by the owners of the land on each side.

Each party shall make and keep in repair one-half thereof when it can be conveniently divided.

When any partition fence cannot be conveniently divided, the same shall be made and kept in repair at the joint and equal expense of the owner on each side."

In some instances, a claim from an insured for damages to a building occasioned by fire, includes items for certain repairs that are required by the building or other civil department, to be made in accordance with existing municipal laws. Assured often feel justified in making such claims because of official notices received from Municipal Building Departments as to present requirements.

The New York standard policy provides that (lines 31-32), "This company shall not be liable for loss caused directly or indirectly * * * * by order of any civil authority;" and (lines 38-41-42), "This company shall not be liable * * * beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings, etc."

Under this clause, the insurance companies are not liable for the increased cost of repairing a building due to work, beyond actual reconstruction as prior to the fire, which is made necessary by reason of the building laws, and any such items, therefore, must be deducted from such claim, as an insurance company is only liable for the direct loss or damage occasioned by the fire in such cases.

The standard policies of some other states differ in this respect, and notably that of Massachusetts, where the above quoted conditions are omitted.

In the case of the Boston Advertiser Building v. twelve companies—Sun, London and others, the appraisers awarded \$30,610, as indemnity in case they had no right, as a matter of law, to consider said building laws, *but* if they had a right, as a matter of law, to consider said building laws, they awarded \$45,792. The Supreme Court of Massachusetts decided that loss attributable not to the fire

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but to the building laws of Massachusetts, and that it was covered by the eleven companies using the Massachusetts form, but not covered by the one company using the New York Standard form, saying that as to the New York policy, the loss should be estimated as if there were no building laws affecting the situation. In other words, such portion of the damage as arises from the existence of the building laws, is not to be considered as a loss or damage by fire, but is to be excluded from consideration. Eleven companies paid on the basis of \$45,792 and one company (New York form) on the basis of \$30,610.

A disastrous fire occurred in a building insured for \$50,000. Proofs for a total loss under the insurance were served claiming a damage of \$53,495. Not intending to rebuild or replace the building without making extensive alterations, assured claimed that the walls should come down to the level of the third floor, although there was abundant evidence that the north and the west walls were intact, and that the requirements of the building department should have been modified, as indeed they were afterwards modified. Estimates were submitted by the companies' builders as to the amount for which the companies were liable—\$19,000 and \$21,249.83, respectively, and by one of the builders for less tearing down than originally required by the building department but more than he thought necessary, \$29,444.83.

All of the companies with one exception, compromised on the basis of \$33,000, the other company, after suit was commenced, settled on basis of \$28,000,—the assured paying all costs.

As to the repairs by outside contractors, acting under orders from the Department of Buildings immediately after a fire, and without the owner having any notice or option respecting same, not one dollar of that cost can be collected from the owner or the insurers.

The Building Department should pay for these "emergency repairs" out of a fund specially created for that purpose from the fines and penalties collected for violations of the Code.

As the object of the work is the protection of life and limb the city naturally and properly charges itself with all of the cost.

This has been apparently definitely settled through several cases which have been decided, the litigation having been carried through the Appellate Division of the Supreme Court of New York

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County, for details of which I refer you to the circular letter of the Committee on Losses and Adjustments of the New York Board of Fire Underwriters to members under date of May 10th, 1909. The legal position is so well explained in an earlier circular letter of the Committee dated August 15th, 1905, that I quote from it—

“Repair work on fire-damaged buildings done by, or under orders of, or at the instance of the Department of Buildings falls into two classes, and is authorized by entirely different sections of the Building Code, according as it is done after or before the service of a notice and, in default of the owner's action in conformity therewith by 1 P. M. the day after such service, the holding of a survey and the issue of a precept from a court of competent jurisdiction. Work done by the owner pursuant to such notice, or done either by the owner or under direction of the Department of Buildings, after such survey has been held and such precept issued, is at the owner's cost beyond a question, and he may or may not be able to collect the whole cost thereof from his insurers. In so far as the work so done was necessary to be done in order to repair the fire damage, and in so far as it was done at a proper and reasonable cost for such work, it is a part of his fire loss under his policies; while in so far as it was done to comply with municipal requirements forbidding rebuilding according to original specifications, or merely to avoid risk to life and limb, and in so far as it was done at a rate of cost beyond what the restoration of the building itself required, the loss, or the excess of loss here specified, was caused by municipal regulation, not by fire, and is specifically excepted from the cover of a fire insurance policy. Whether the cost of such repairs is in whole or in part recoverable is therefore a matter for adjustment either by agreement or by appraisal. As a matter of fact, underwriters invariably deal very liberally with their policyholders in this respect, recognizing that the latter are practically helpless to delay such repairs for any very full inspection by company adjusters or builders.

But as to the repairs made by outside contractors, acting under orders from the Department of Buildings, immediately after the fire, and without the owner having any notice or option respecting same, the case is very different indeed. These are “emergency repairs,” pure and simple, and not one dollar of their cost can be collected from the owner; and for that reason the latter cannot collect anything on account thereof from his insurers, even though a considerable part of the work so done would in any case have had to

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be done in order to make proper repairs; having no loss on the item the owner can collect nothing therefor from his insurers. And the reason he has no loss on it is that the Building Code provides for the payment of these "emergency repair" bills out of a fund specially created for that purpose from the fines and penalties collected for violations of the Code, and makes no provision whatever for assessing any part thereof on the property owner. As the object of the work is the protection of life and limb, and as the cost of it, done for that purpose and with great rapidity, even if done efficiently, is far in excess of the owner's need for the mere purpose of repairing his building, the city naturally and properly charges itself with that cost, and with all of the cost, since no separation of these two elements is possible."

"A comparison of the provisions of sections 153-155 of the Building Code, dealing with notice, survey, precept and Court proceedings, with those of sections 157-158, covering action in cases of "actual and immediate danger," and providing for the fund from which the cost of such action is to be defrayed, will confirm the foregoing construction of the law, which your Committee have thought it proper to bring to the notice of all members of the Board in this way."

Insurance against damage by lightning does not include windstorms. A severe windstorm tore off the tin roof of a building from front to rear, and that was the only damage done to the building, even the telephone wires not being at all damaged. The insurance company was sued for damage by lightning. The record of the Weather Bureau was brought into Court, showing that at the time of the damage there was a terrific windstorm, the wind—amounting to a gale—blowing at the rate of ninety miles an hour. The claimant lost his case.

A small frame church, built on posts without other foundation, was wrecked during a violent windstorm accompanied by severe lightning. Claim was made under the fire insurance policies that the damage was the result of a lightning stroke. It was found that sheds and fences some distance from the church, on the side the storm had come from, had been wrecked and that standing trees even, several hundreds yards distant, on the opposite side, had been blown down or broken off in a distinct path, a hundred yards or more wide, in line with the church and sheds beyond. After careful consideration and consultation with the Archbishop of the Diocese,

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the priest in charge of the parish was authorized to withdraw the claim for total loss which had been made and to accept the compromise settlement offered by the insurance company of \$300, which represented the amount of damage a lightning stroke might have caused. In this case there were, as was to be expected, more or less conflicting stories by those living near as to the lightning they saw, though no one was able to say he had seen the church struck. The timbers of the church showed no evidences of the splitting and tearing action of a lightning stroke, they were nowhere discolored by it and no fire ensued.

The action of lightning on a building which has been struck is commonly well marked. The resulting damages may never be twice alike, lightning plays strange freaks, but what has happened can usually be plainly traced in the melting of solder used in the plumbing or metal roof, the splitting and rending of beams or masonry, evidently violently knocked off plaster and split siding, even when there is no discoloration such as not uncommonly occurs though no fire has ensued. Factory chimneys, church spires, and other lofty ornamental features above the roofs of public buildings, unless scientifically guarded against lightning, and flag-poles are probably most subject to lightning damage. The recent practice of setting flag-poles in the ground in front of buildings or in school yards, instead of on their roofs, is much to be commended.

In case of damage to electrical equipment by electricity, whether natural or artificial, if the policy contains the "Dynamo Clause" it should be borne in mind that the fire insurance companies are not liable for the electrical injury or disturbance, and, if fire ensues are liable only for the fire damage to other apparatus than that where the disturbance originated, notwithstanding any provision to the contrary in the usual lightning clause, if any is attached.

ADJUSTMENTS.

The instructions to all adjusters as to seeing the policies first, by the Loss Committee, November 9th, 1904, are so complete that I call attention to them, and advise adjusters to read them carefully. There is often trouble in seeing building policies first, as they are generally in the possession of mortgagees, who sometimes refuse to allow the policies to leave their hands, although the policy is the contract and not the records of the company; the adjuster can, however, examine the company registers and should not rely on dupli-

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cate policies, which do not give the full forms and omit endorsements made after their issue. The original policies should always be examined before a loss is adjusted.

The first duty of the adjuster is to ascertain if possible the cause of the fire, and whether it is a loss for which the company is liable. If in doubt, he may, without committing the company, say he neither admits nor denies liability, and have the claimant sign with the company a non-waiver agreement, which provides that any action taken is simply and only to arrive at an agreement as to the amount of the loss or damage, and does not waive any of the rights of either party.

Special attention should be given to ascertain if the fire was caused by any inherent defect in the building or in the construction of the chimneys. If no natural physical cause can be given to account for the origin of the fire, an investigation should be made of the moral and financial status of an insured.

Should your investigations indicate fraud as to the origin of the fire, or if the claim of the insured arouses your suspicions, it is always advisable in such event to "make haste slowly."

If you have any suspicions as to the origin of the fire, or of the claimant, it is always advisable to be exceedingly cautious so as not in any way to create a waiver, or to make use of any expressions as to there being no liability under the policy, as an inadvertent expression of this nature can many times be used by a fraudulent claimant to the detriment of the insurance company. Always conduct your investigations along the broadest possible lines and give an insured the benefit of a doubt. Give each case frank and open treatment, for a conscientious straight-forward investigation invariably brings forth successful results.

Upon receipt of notice of loss, it is always advisable to give same immediate attention, and especially is this necessary in the event of partial damage to a building. It may be that the roof is burned off or badly damaged, thus exposing the interior of the building to the possibility of added damage by the elements. If attended to at once, the repairs may be made at comparatively small cost but which, if neglected, might develop into quite a serious loss.

Through ignorance, many of those who have fires have failed to study the conditions of their policies and consequently when a loss occurs neglect their first duty,—which is to protect the property from further damage, so that it is always advisable to get to the

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scene of the fire as soon as possible in order that the double purpose is served, of giving an insured prompt service and, at the same time, saving the company the possibility of increased damage by the elements.

It is advisable that temporary repairs should only be allowed when urgent and then the amount of cost of such temporary repairs should be agreed upon if possible in advance.

The insured is not entitled to the cost of new for old and the actual amount of loss to be paid an insured should be computed on the cost of the necessary repairs less any depreciation on account of age or condition.

In the larger cities it is the custom for the company's adjuster to obtain an estimate of the cost of repairs from a responsible builder or contractor and, in fact, it is advisable to do this wherever possible as the company's representative then has an actual figure or bid to present to the insured for the repairing of the damage occasioned by the fire, but it is also advisable and, in fact, necessary that an adjuster have what may be termed "a working knowledge" of making building estimates, and he should always keep in touch with the varying costs of building materials and labor in order that he may be in a position to intelligently discuss the estimates he has obtained in comparison with those obtained by the assured.

Always insist upon having an estimate made in detail both from the builder or contractor you employ as well as from the builder or contractor employed by the insured, for in this manner one can be checked by the other and an adjustment arrived at, fair alike to the insured and the company. Estimates in detail should be procured from a competent and responsible builder who is a good judge of the extent of a damage by a regular, irregular or obstinate fire, and also has a fair knowledge of the insurance contract. He should be competent to detect the items which the company should not allow, as well as those for which an exaggerated price is made, and be willing to make the repairs for the assured at the price named by him, after agreeing on the specifications of work to be done.

The estimates for the assured in ninety per cent. of losses will differ largely from the company's builder, because the assured's specifications will probably include other repairs beside those necessitated by the fire, and such should not be at the expense of the insurance companies. Too often these estimates seem to provide for large profits for either the assured, his contractor, or both; and seldom do they contain an allowance for depreciation.

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In some instances, especially in outlying sections of the country, it will be perhaps difficult to obtain a builder's estimate without considerable expense or delay, in which case it would be necessary for the adjuster to make an estimate of the building himself, going over the various items and details with the insured.

In such cases, if there is any doubt as to local costs of material and labor, make inquiry regarding same at the nearest available point before proceeding to the actual scene of the fire.

Most country buildings will be found to be what is termed "balloon construction" and the value of such buildings can be obtained by taking correct measurements of the floor or ground space and the height of each story, making due allowance for windows, doors and other openings.

Make a rough plan of all floors of the building and a sketch of its elevations. Measurements should be taken and due allowance made for closets, doors, shelving, etc.

The costs of doors, windows, etc., should be worked out separately and added to the cost of framing and floors.

The number of yards of plastering required can be found from the floor plans and the height of the rooms.

To obtain the number of rolls of paper required for side walls of rooms that are papered, one can take the number of yards of plastering required for each room, deduct therefrom the ceiling area and divide the remainder by four.

For interior painting it will, of course, be necessary to take the measurements of the surface to be covered.

For outside work, this can be obtained from the area of the cornice and siding.

Allowance has to be made for gutter work and spouting, the cost of which can be obtained by measuring the eaves and height of the building.

The measurements for chimneys must be obtained from the ground and floor plans. The number of bricks required can be obtained from the measurements thus obtained on a basis of allowing seven (7) bricks per superficial foot for an eight inch wall, etc.

It is always advisable to spend the necessary time to carefully figure out in detail, as a costly mistake might be made on either side by endeavoring to make a lump estimate. It has been said, "The lump adjuster does ill because he doesn't know what his lumps contain."

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Repairs may be made by the companies by mutual agreement, but as a rule it is preferable to agree upon the amount of damages and cost of repairs and to allow the insured to employ his own builder to do his work. Unless a special agreement is made that assured is to contribute toward the repairs an amount equal to the agreed depreciation of the fire damaged portion of the building, the company will be obliged to reconstruct, giving new for old, without any abatement in the loss. If the insurers in an attempt to restore the property do more than their contract obligates them to do, they cannot claim allowance for excessive value.

In cases where by mutual agreement the company agrees to make repairs, it is always advisable to have a full detail of what is to be done and a referee appointed in the agreement so that there can be no misunderstanding or quibbling after the work has been finished. When the work has been completed to the satisfaction of an insured, it is incumbent upon the adjuster to obtain a release or satisfaction piece signed by an assured. It is the wise course to ask insured to file formal proofs before attempting to make repairs, for it is often difficult to obtain them after repairs are completed, and if the company is to pay the bills it is entitled to insured's statements as to ownership and compliance with policy conditions before it has parted with its money.

If the policy carries a coinsurance clause, satisfy yourself that there is enough insurance to comply with it, or by making the repairs the companies will lose the value of the protection of this clause.

APPRAISALS.

If the insured and the adjuster cannot agree upon the amount of work to be done, and the insured will not correct or modify specifications, or if they do agree as to the work to be done, and the insured is not willing either to make a contract with the company's builder for him to make the repairs at the price he names, or accept a reasonable settlement, then an appraisal becomes desirable.

Under the decisions of the courts a mortgagee may be the insured or is held to have a separate contract, and may not be bound by an appraisal to which he was not a party, and therefore it is best to secure the signature of the payee as well as the assured to an appraisal agreement, particularly if the policy contains other than the simple loss payable clause.

Primarily, it is the concern of the assured to see that an appraisal is had, in order that he may not lose his standing in court,

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but where the company requests an appraisal, if he destroys evidence so that an appraisal cannot be had, he has no standing in court and can collect nothing.

The right to appraise arises as soon as disagreement occurs, whether before or after proofs are furnished, and the nomination of appraisers need not be in writing. The appraisers must be competent and disinterested. The word disinterested does not mean simply a lack of pecuniary interest, but requires the appraiser to be one who is not biased or prejudiced.

Under the policy conditions the holding of an appraisal is not an admission of liability on the part of the company, but it is usually advisable to request formal proofs of loss before entering on an appraisal.

The appraisers, in their award, are bound to deduct for depreciation the difference between new work and old.

No award, signed by either the two or three appraisers can be set aside, unless there has been fraud or palpable error.

It may not be amiss to refer to the so-called "5% waiver clause" attached to many coinsurance or average clauses. The clause usually reads: "In case of claim for loss on the property described herein not exceeding five per cent. (5%) of the maximum amount named in the policies written thereon and in force at the time such loss shall happen, no special inventory or appraisal of the undamaged property shall be required."

If the insurance under this policy be divided into two or more items, these clauses shall apply to each item separately."

This does not waive the application of the coinsurance condition, but provides only that no appraisal will be required of the undamaged property, i. e., to alone establish the whole sound value, if the loss is less than 5% of the existing insurance. If the building is notably under insured and you agree upon the amount of loss before you agree upon the sound value, which the assured is obliged to state in his proofs of loss, if the assured is willing to underestimate and misstate the sound value, you can hardly then ask for an appraisal, although you argue that the amount of the company's liability is not fixed until the question of the application of the coinsurance condition is determined. Satisfy yourself that there is enough insurance to make the coinsurance clause inoperative, or be sure to reach a satisfactory agreement as to the sound

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value *at the same time* you agree as to the amount of loss. Do not leave the sound value to be determined later. If a disagreement as to the amount of loss exists, the appraisal condition of the policy governs and an award will properly fix the whole sound value as well as the damage.

APPOINTMENT OF UMPIRE.

The appraisers must first appoint an umpire before proceeding with the appraisal. N. Y. Laws of 1913. (Policy lines 86-91). "When the appraisers shall have failed or neglected for a space of ten days, after both have been chosen, to agree and select an umpire, it shall be lawful for either the insured or the company to apply to any court of record in the county in which the property is located, on five days' notice in writing to the other party of his or its intention to do so, to appoint a competent and disinterested umpire."

The umpire has no other authority than to pass upon such items as the appraisers cannot agree upon. He cannot review what the appraisers have already agreed upon, nor should he make a lump figure for the whole loss or damage.

DIFFICULT CASES.

Stone work chipped or spawled by fire outside of a building—the structural strength not weakened in the least degree—can often be repaired so that the small damage cannot be seen.

Claim is often made for new stone work. In one of my cases a claim involving the building of a scaffolding from the sidewalk to the twelfth floor, the appraisers awarded the full cost (some \$600) which the companies paid. Needless to say, the stone work was neither removed nor repaired and the claimant pocketed the amount awarded. In such cases, I have found it often more prudent to compromise, even where an unjust claim was made.

In another case, water from one sprinkler went down the side of an elevator shaft. The cables were, as normally they should be, permeated with grease and practically impervious to cold water. Claim was made for new cables. A joint electrical test was made by the company's electrician and the electrician of the assured, who each agreed that no damage could be found, but the elevator expert claimed that a damage might show up at some future time. Seven months after the claim was made, the cables showing no damage, the claim of \$58.00 was compromised. Seventeen months after the fire, the cables were still in use.

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A fire occurred in a large old building occupied as stores and offices. The authorities refused to allow any electrical repairs to be made, but compelled the removal of all the electrical work in the main building—extending to the Edison main in the street. Claim was made for loss and damage, in all \$23,084. Award of appraisers \$9,848 based on equipment as it existed at time of fire.

Another claim in an old building was made, involving among other things, new work for old. The insured, when an appraisal was suggested, demanded that the company take their adjuster off and substitute another in his place, which was refused, and the insured told that his loss would be adjusted by the company's adjuster on its merits, a settlement of the claim of over \$18,000 was made with the mortgagee at \$10,000.

Claim was made on estimate presented of \$1,100. Appraisal being insisted upon, a second estimate was presented, dated the same day as the first, for \$720; the loss was settled at \$670.

Another case—estimate presented for \$1,350; second estimate, \$1,275; third estimate, \$880; and award of appraisers, \$475.

Of 18 claims, in a given period, amounting to \$307,692, appraisal awards totaled \$167,287.

A contract of sale was made by a building company, title to be passed January 1st. On December 1st, eleven days after the contract was made but a month before papers were to be passed, a fire occurred. Claim was made for \$1,900 which included actual loss or damage, and also expense of putting entire premises in order to the satisfaction of the new owner-to-be. Claim was settled at estimate of companies' builder for \$950.

A one and a half story farm house, over a hundred years old, was changed into a city dwelling and somewhat modernized. The roof and sides of the building were shingled with old fashioned handmade shingles, the floors old style wide boards, and the partitions old style also. The fire destroyed part of the roof and of the attic. Estimates were presented by the assured, respectively, \$2,030, \$1,960, \$1,923, \$1,900, and \$1,875, all of them included obtaining plans and permits from the Building Department, and one of them "in accordance with the plans prepared by a named architect." The estimate for the companies allowing for depreciation, was \$1,025. Proofs were served claiming sound value \$5,000, loss \$2,000. The appraisers award was sound value \$3,750, loss \$1,233, which included accrued damage by rain and wind after the fire, and after estimate for the companies was made.

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Estimate for assured was \$13,650 exaggerated claim being made for damages not caused by the fire. Estimate for the companies was \$4,531. Award signed by the two appraisers and the umpire—\$5,946. Each of the appraisers and the contractor who made the estimate for the companies signed a written agreement to make the repairs (saying there was a liberal profit for them), for the amount of the award. Complaint was made to the companies interested of the so-called conduct of the appraisal and of the adjuster for insisting on an appraisal.

An exaggerated claim of \$36,968 award of appraisers \$24,266. There was a long delay in arriving at award owing to appraiser for assured adjourning the meetings time after time, while he consulted with claimant, giving as one excuse that the assured had a rent policy and was in no hurry because his rent claim was accruing. As a matter of fact, the rent loss had been adjusted nearly two months before the award was arrived at. The policies having a 100 per cent. co-insurance clause and the sound value being more than the insurance, the assured could not collect his whole loss from the companies. 'The appraiser for the assured contended that if he had known there was a 100 per cent. co-insurance clause, he would have had the sound value made smaller, and acting for the insured, actually asked the companies interested to reform their policies and have them read 80 per cent. instead of 100 per cent.

A tenant leased a building in which there was and had been for some time a large stable and wagon elevator. He made all the repairs for some years, and finally claimed the elevator as his property, and insured it as such in his contents policies, which read "including freight elevator." The owner of the building also insured "elevators with appurtenances and connections." The tenant without notice to any of the companies, repaired the damage caused by the fire, amounting to \$145, and claimed that amount of the companies insuring contents, which, of course, they did not allow; the building companies paid the amount as they properly should.

There was a loss in an apartment house, estimated by the insurance company's contractor at \$150. He made an appointment with the owner to go over with him the details of his claim of \$525, but was met by the lessee, who said he was "the same as the owner," as he had a three years' lease and that he must be satisfied and not the owner, that the work must be done to his satisfaction; that he directed the making of the estimate and specifications presented by the owner, that he was sure that he could get the owner to take

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\$300, if the company would make that offer, and that if they would not make that offer, he would sue the company. Needless to say the adjuster refused to treat with the lessee, or to recognize him in the settlement, which was made at about the estimate made by the company's builder, after an appraisal had been demanded.

A new building fell soon after the owner had loaded it with a large stock of merchandise. It was proved on the trial that the owner, after having plans and specifications made, which would have made it a safe building, discharged the architect, and employed an ordinary contractor to change the plans, and lessen the cost, thereby so weakening the structural strength as to render it unsafe. There was abundant evidence that the building fell before fire ensued, and the insurance companies had, as supposed, a clear case. But, on the evidence of one witness, the last called, that he saw smoke coming out before the building fell, a large verdict was rendered for the claimant. After the trial was ended, it was found that if the witness saw smoke, he must have seen through two brick walls. Verdict for the claimant, but settled by compromise at considerably less than the award of the jury.

AWNINGS.

Claims for damages to awnings and buildings are numerous, the cause being easily attributable to tenants throwing cigarette butts or matches out of windows above. A few dollars may cover the damage to the awning, but the tenant is likely to make the unreasonable claim that the entire room or rooms must be redecorated although there is but a small blister or discoloration of one window frame, and the owner may insist upon the tenant being satisfied, at an expense of many times the amount of the actual loss.

Damage to awnings stored in the cellar, and the additional damage to the building caused by heat and water, are often caused by delivery boys with cigarettes and matches. In a recent case, 126 awnings out of 200 were destroyed, and with an additional damage to the building the loss to the insurance companies was nearly four hundred dollars.

Awnings are subject to rapid depreciation, but it is very difficult to obtain adequate allowance for age, fading and wear.

Cellar bins are used by numerous tenants for storage of unused or discarded furniture, mattresses and other inflammable material. A lighted candle, or a match, "Looking for something," may start a fire, resulting in a serious loss to the building and contents. There are many of these fires. Inspection of these bins by official in-

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spectors, or by the companies insuring the building, would undoubtedly lessen the number and extent of these careless fires, particularly if some proper permanent lighting arrangement should be insisted upon.

In a recent case, an old mattress took fire but did not have a chance to burn up as the janitress extinguished it. There was no damage to the building by fire, but the Fire Department caused a damage, including two skylights four floors above the cellar.

Of the losses of comparatively small amount, in dwellings and apartment houses, we meet as causes—children with matches, awnings from cigarette butts or matches, holiday or Friday candles, and taking candles or lighted matches to “find something,” in clothing closets and basement storerooms; wood too near ranges or stoves, curtains too near gas jets, drinking or careless janitors, store delivery boys smoking cigarettes near dumb-waiter, and especially the practice of storing discarded furniture and mattresses in cellar bins.

In manufacturing risks and in office buildings, rubbish under stairs or in hallways, packing boxes and excelsior accumulations, carelessness of cleaners with oily rags, causing spontaneous combustion, and especially carelessness with cigarette butts or matches, cause many fires.

ADJUSTERS.

It has been truly said that the adjuster's acquaintance with the conditions of the contract and with Insurance Law should be so good that no lawyer's opinion on any point of purely Insurance Law should have any weight with him unless accompanied by the reasoning or precedents on which it rests. He should have executive ability, a judicial mind and an even temper; he should be fearless in the face of unjust or arbitrary criticism and not over-sensitive about it.

XX

**ESTIMATES ON BUILDING VALUES AND
BUILDING LOSSES**

WILLIAM J. MOORE, General Contractor

CONSTRUCTION.

Buildings in New York City are classified by the Building Department as follows: Fireproof, non-fireproof and frame.

FIREPROOF BUILDINGS.

Fireproof buildings or structures are those which are constructed throughout of materials that will resist the action of fire, and which have walls built of masonry or reinforced concrete; columns and beams of iron or steel; floor filling, either of terra cotta arches or concrete.

When a building exceeds a height of 150 feet, all exterior window frames and sash are required to be of metal, or of wood covered with metal.

When the height of building does not exceed 150 feet, the doors, window frames, trim, casings and other interior finish, when filled solid at the back with fireproof material, may be of wood. No wooden doors or windows are allowed in any building exceeding the height of 150 feet.

The Law requires that every building hereafter erected shall be a fireproof building, as follows: Every public building over 20 feet high, in which persons are harbored to receive medical, charitable or other care or treatment, or in which persons are held or detained under legal restraint; every other public building over 40 feet high or exceeding 5,000 square feet in area; every residence building, except tenements, over 40 feet in height and having more than 15 sleeping rooms; every tenement house exceeding six stories or parts of stories as provided in the Tenement House Law; every residence building having more than 15 sleeping rooms and exceeding 2,500 square feet in area, unless divided by interior partition walls of approved masonry or reinforced concrete into sections of less than 2,500 square feet area; every other residence building over 75 feet in height; every building over four stories in height used as a factory as defined in the Labor Law; and every building or structure within the fire limits or the suburban limits used as a grain elevator or a coal pocket.

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NON-FIREPROOF BUILDINGS.

Non-fireproof buildings or structures are those which do not conform to the requirements for fireproof buildings or structures, but which are enclosed with walls of approved masonry or reinforced concrete.

FRAME BUILDINGS.

Frame buildings or structures are those of which the exterior walls or any parts thereof are of wood, or which do not conform to the requirements for fireproof or non-fireproof buildings.

There are two distinct methods of framing a building; one with plate tenoned into the post and pinned, and known as the "brace construction," the other, what has become known as "balloon construction."

Throughout the country most frame buildings are of balloon construction, and I believe that laws should be passed requiring that in every case of balloon construction, fire stops be put in at each tier of beams, as this would, to a great extent, prevent the spreading of fire. Experience shows that, without this precaution, when a fire extends to the space between the studs, it will either run to the top of the space, and there mushroom; or drop to the bottom of the space and work its way upward, spreading laterally as it goes; or it may do both.

In New York City within the fire limits, frame buildings are prohibited. Outside the fire limits, and throughout the suburban districts, most of the buildings are frame.

PLANS AND SPECIFICATIONS.

Before erection, construction or alteration of any building is commenced, the owner or lessee or agent in connection with the proposed construction or alteration, or the architect or builder, shall submit to the Superintendent of Buildings a detailed statement in triplicate of the specifications on appropriate blanks to be furnished to applicants by the Bureau of Buildings, and a full and complete copy of the plans of such proposed work, and such structural detail drawings of said proposed work as the Superintendent of Buildings may require.

In New York City and most of the other cities of our State are Building Departments whose officers go thoroughly over plans of buildings. Here the Building Department is under the head of a Superintendent with a corps of engineers who thoroughly inspect the plans and pass upon them, before a permit is given.

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The Building Department is a great help to the builders of New York and also to the Insurance Companies. In case of a building damaged by fire, where it is impossible to get plans of construction, plans may be seen at the Building Department without privilege of removal and they will be found to be complete.

Of the small communities, the majority at present have no Building Departments and the people are allowed to build almost as they see fit.

VALUE OF BUILDINGS.

The building contractor and estimator engaged in computing the costs of our modern buildings must eliminate the item of guesswork from the estimates as far as possible. This is not an easy matter, as building construction methods can hardly be reduced to the scientific basis of factories and shops, with their fixed surroundings and control of weather vagaries. When the many unforeseen conditions entering into the cost of modern buildings are taken into consideration this is readily seen—weather, rain, snow, cold, etc., all capable of causing inestimable damage and expense.

In arriving at the value of a building, it is absolutely necessary that we obtain correct measurements of ground space and the height of each story.

In fireproof buildings obtain the correct length, size and weight of iron columns, girders, beams and how constructed, and the ornamental iron work including stairs. Mason Work—obtain the measurement and thickness of walls, and of what materials, noting particularly the stone work or terra cotta trimmings; the floor arches, their construction, thickness, and of what materials. Partitions—their thickness, also thickness of cinder fill to level arches and between sleepers. Plastering—number of yards, cornices and other mouldings, if any. Tiling—the square feet of flooring and walls. Roofing—the number of square feet and of what material. Cornices—if of stone, terra cotta, copper or galvanized iron. Skylight—whether copper, iron or galvanized iron and how glazed. Carpenter Work—bucks, sleepers, underflooring, finished floors, doors, windows, and other sundries, each in detail. Plumbing—sewer, upright lines, fixtures, of what description and make, their connections, etc. Heating—note particular make of boiler, piping, radiators, and their connections, including the finishing of same. Electric Light Wiring—number of outlets, switches, feed lines and cut-out boxes, being

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very particular about the fixtures. Painting and decorating. Fire-proof doors and windows. Elevator. Bell Wiring and any other sundries that go to make up a building.

After obtaining correct quantities in all the various items, which go to make up a building, place correct price on same, taking into consideration the increase of cost of materials at the present day. This cost is fluctuating. Wood materials, such as beams, flooring and studding have increased in three months, ten per cent. Iron Work has increased in cost, thirty dollars per ton. Copper has doubled in price. Metal lath in plastering has increased six cents a yard. Cement has increased twenty-five cents a bag. Materials for making paint have increased fifty per cent., and in some cases one hundred per cent.; but, taking it in all, the increase on materials has been an average of fifteen percent. (April, 1916.)

Labor this season has seen a great deal of unrest in the Building Trades. We have just succeeded in establishing a rate of \$5.50 per day for our carpenters, an increase of ten per cent. Painters have increased ten per cent., and wages for unskilled laborers have increased about fifteen per cent., so in all there is a general increase or an average on cost of materials and labor of ten per cent.

Non-fireproof buildings and frame buildings should be estimated on in the same careful manner, taking off each item in detail.

In making all of these estimates, it is absolutely necessary that the correct quantity should be established, distinctly noting the class of materials and seeing that the correct prices are put on each of the items. After figuring the building out in detail, every builder who goes into the work carefully should establish a sound value by cubic feet for the class of building, the details of which he has been making.

In estimating for Insurance Companies, many builders, with their vast experience in establishing values, can very readily, sometimes by looking at a building, and at others by taking the ground space occupied and the height, give the valuation of a building in a very short time. These cubic foot estimates by experienced builders will come near enough in most cases for estimating the sound value of a building, unless the difference in the valuation and the amount of insurance carried should appear to be very far apart. In such case a detailed figure should be made.

In the cases of Churches and Public Buildings, it is almost impossible to arrive at satisfactory results by following the cubic foot method, and the only reliable way will be to estimate the values in detail.

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Most of the large estates around New York and the large manufacturing plants throughout the east have valuations put on their plants so that the correct amount of insurance is established.

The hardest problem I find in making valuations of buildings is presented by some of our large corporations, who, not with reference to insurance, but to leaseholds, want the original cost, the visible depreciation and then a percentage of depreciation to the building because of the neighborhood in which said building is situated.

A large number of buildings were, a few years ago, in first-class sections, but today the neighborhoods have changed and in many cases have depreciated so much that the buildings and lands are not worth the original cost of the buildings alone. As a rule agreements in such cases are satisfactorily achieved, but not without radical readjustments of value, involving not only buildings but the lots on which they stand.

During the last few years a great number of our neighborhoods have changed so rapidly that buildings have become vacant, not on account of any lack of condition, but because newer buildings have been put up in new locations which attract the occupants. A great deal of this property has deteriorated in value and for the time being the question is a very hard one to solve. But the only thing that I as a builder can do is to establish the value at the cost of materials and labor subject to a depreciation for wear and tear only.

In establishing the values of buildings it is absolutely necessary that a builder of experience be engaged.

My office has, for several years, been establishing sound values on a large number of buildings belonging to various estates in New York, on docks and buildings, shipyards and large mercantile establishments, throughout the east. Last year our work in this line was particularly heavy, and this notwithstanding that for several years back, the Exchange has not accepted these estimates for the simple reason that too many irresponsible builders were making figures on cost of buildings, and whose figures were simply made to suit the request of person asking for them, instead of being absolutely fair and unbiased.

In appraising after loss a large number of these unfair valuations have come to my attention. Today, an owner who is asking for an estimate of sound value of building does not try to influence his builder on cost, unless it is after a fire has occurred.

ESTIMATES ON BUILDING VALUES AND LOSSES LOSS ESTIMATES.

In making an estimate of loss or damage to building by fire or water the first requirement of a builder, in my estimation, is that he should be absolutely fair to the Company and the insured alike. In my twenty-five years of doing work for the Insurance Companies I have yet to find a Company who ever asked me to be unfair; in fact, I have been told by a number of the Companies' representatives to pay 101 cents on the dollar rather than 99 cents.

The making of estimates of loss to buildings has been somewhat revolutionized during the last few years. In former years all that was necessary for a builder to do was to submit a lump figure as his estimate. This, today, will only do for a telephone call to let Company know approximately extent of loss, but most Companies and the Loss Committee now insist on details. I, myself, some years ago was opposed to giving details; but, upon taking the matter up with several of the adjusters of the Companies and talking same over in a sensible manner, I decided for our firm that we would do so.

Some of my competitors said sour things about me and stated it was giving too much information, but after several years' trial, I do not seem to have lost any business by so doing. I am a firm believer that small losses should be adjusted by the adjuster of a Company without sending for a builder, unless in case of a difference.

A builder may, with sufficient accuracy, estimate the loss on a building without giving any details whatever in his written estimate and if the accuracy of the estimate is challenged he may be able to sustain it when it comes to discuss the amount of the loss with the insured or the insured's builder, or both. If such conversation develops the fact that he has underestimated on some items, it is very likely to develop that he has overestimated on others; but, as he has given nothing more than his estimate of the cost of the entire loss, nobody will be the wiser.

On the other hand, with the estimate given in detail (usually in duplicate), to the adjuster, one of two things is likely to happen: either the adjuster before giving information as to the details to the insured or his representative will detach the sum set opposite the details of the work and give out only the latter; or he may, in disregard of the builder's wishes, give out a copy of the details, including not only items of work to be done but the amounts to be

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charged therefor. In either event the insured can easily check the details against the apparent damages and either call attention to omissions or to errors in estimating the cost of the items of work. With this prospect before him, the builder, with a reputation as competent in his line and desiring to retain it undiminished, will necessarily take more time and use extra care in order that his figures may be as nearly right as possible, not merely in the aggregate, but in detail as well.

The giving of an estimate in such full detail as has for some years been my practice necessarily increases the cost, not only because of the greater expense of transcribing the report, but also because of the greater care required to secure accuracy.

The extra cost involved is, however, a good investment for the Companies—in the long run surely. Oftentimes owners are misled by the builders whose estimates they, in good faith, have asked. Many a builder so employed reasons that he owes no obligation to the Insurance Company to avoid overcharge and that if his estimate is too high the man who employs him cannot suffer, and that if the owner succeeds in obtaining an unnecessarily liberal allowance from the Insurance Company, he (the builder) will reap the benefit by being able to obtain the contract at a higher figure than the owner could afford to make to him if, when the estimate was asked for in the first place, it had been with knowledge that the cost would have to be met out of the owner's own bank account rather than that of the Insurance Company.

A detailed estimate such as I have described will oftentimes be the means of convincing the owner that the estimate obtained by him was for an unjustifiably large amount. The honest insured, in such a case, frequently insists upon full correction of the estimate obtained by him, or disregards it entirely, obtaining another from another builder, who, with proper instructions, may bring in an estimate nearly or wholly in accord with that obtained by the Insurance Company. Even where the owner cannot relieve himself, in whole or in part, of responsibility for the inflation of the estimate presented by him, the possession by the Company's adjuster of the details will often enable him, without trouble, to demonstrate the falsity of the estimate that has been presented to him.

No adjuster should ever take a final stand on the strength of a building estimate without first submitting to the insured the details of the work which the Company's builder has estimated on, except in

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the case of some of the small losses. No builder can be sure that he has seen and estimated upon every item of damage to the building until the owner has approved this portion of his work. He may have omitted to estimate upon some item of value known to the owner or to the owner's representative to have been destroyed, the existence of which may not even be faintly suggested by the condition of the building when the builder visits it alone, for the purpose of drawing up his statement of work to be done. To cite familiar instances: A closet, a partition, a door, a skylight or special decorations may all have been absolutely destroyed by fire with nothing to suggest their previous existence to any one not thoroughly familiar with the building immediately before its damage or destruction by fire, and in such a case before the adjuster can properly say what he will or will not pay, he should submit to the insured for approval or correction the details of his builder's estimate.

Oftentimes the corrections claimed are in excess of those warranted, not always because of the insured's desire to be paid for that which he did not lose, but because of faulty recollection or incomplete knowledge. For this and other reasons it is often advisable that in cases of difference as to the amount of work to be done the parties should meet at the building and discuss the corrections claimed. The parties to the conference, at the place of the fire, should include the adjuster, the builder who has estimated for him, the insured, or his authorized representative (preferably the former), and the builder on whose expert knowledge and advice the insured is relying.

In making estimates of small losses the builder should be thoroughly qualified to make all the figures, and know extent of fire damage himself, without any sub-contractor. In large losses we have made it a rule for years, in my office, to figure off every item of loss in the various branches of the work, then send our sub-contractors to estimate on each item of damage in their respective lines. We go over their estimates carefully and if we find any marked difference between our figures and theirs, we send for them and talk the matter over to see why the difference should be. Many a time we go back to the building and go over it again until we are satisfied which estimate is correct, before we put it in to the interested Company or Companies. I believe that all builders doing work for the Companies should do the same, for if this is done and the builder should be called upon to make the repairs, he will do so without hesitation, knowing himself to be safe.

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Builders should be very careful when estimating to be sure that they are in the right premises, as I know that occasionally mistakes are made and sometimes the Companies have paid loss on the wrong building. If there is any question of location, the builder should call up the Company and make sure the location is correct. Companies could help builders if they would try to get the correct number of the building instead of description giving number of feet, as generally the number of feet is guesswork. It recalls to my mind the circumstance of a loss on which I was retained at Baltimore, directly after the large conflagration. A builder there, who had been doing work for the various Companies in Baltimore for a number of years, gave an estimate on a building in which a number of Companies were interested. As the figures made it a total loss several of the Companies paid their proportions of the claim on that basis. Not knowing anything about the circumstance of this case whatsoever, I was called in one night and asked to take a look at the map and cube the building. As I had been down there several days and was familiar with the location, cubing at the prices that I knew to be practically correct, I found that the building was not worth over 60 per cent. of the insurance.

The Company for whom I made the estimate had not paid its proportion of claim and an examination of the building was made. The following day I sent for the builder who had made the figures, brought him to the building, took measurements, figured it out and could not find the value to exceed the amount that I had placed on it while cubing it, but found that this man had figured two buildings as one, and made him admit so while there.

The Companies who had paid their proportions were out considerable money and I do not believe they have ever recovered any portion of it; so this illustrates how necessary it is to be sure you take in only what the Company actually covers.

Some years ago I was sent to a building in Monroe Street to make an estimate for an Insurance Company. After turning in the estimate I was called up by the Company who informed me there was quite a difference and requested I meet the assured at the premises. I was there as I thought, the insured did not seem to come, I called up the Company, but he had called up before I had. It seemed strange, but I found out there was another building with the same number on the same street, and both had a fire in them. This, as a great many know, was not an uncommon matter a few years ago. It seemed strange, but I had found the smaller fire first.

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But builders are not the only ones who get into the wrong building. for I know an adjuster who found the right number in a block and thought he was in the right place, and did not discover his mistake until he practically had a furniture loss closed. After several hours' work, on looking at the policy, he discovered it was not his but another Company's policy. Inquiry of the lady whom he had taken to be his insured developed the fact that he was one block too far south. By a coincidence, houses of the same number on the two streets had been damaged by fire almost at the same time.

Builders should be careful on an out of town loss when a building may have been in course of construction, to find out how far it may have progressed. A peculiar circumstance comes to my mind where a man insured a building for \$3,500 and, after its destruction by fire, stated that the work had been completed and looked for the full amount of the insurance. Upon investigation, something peculiar in the ruins called to my attention the fact that the building could not have been completed and in going among the neighbors some distance away from fire, I found that the building had only been lathed, that the mortar was made up in the cellar and had not even been applied. This man when it was called to his attention admitted this fact. When the amount of the loss was finally settled it was only about 50 per cent. of his claim, and he received all that he was justly entitled to.

If a builder omits any work in making up his estimate believing the same to belong to the tenant, special note should be made on his estimate so that the Company will know that this special item has been omitted and the omission will not lead to any misunderstanding.

FOUNDATIONS.

Some policies exclude foundations and sometimes the question comes before the builder, where do foundations end and building proper begin? I know of no better way of deciding than the definition contained in the Building Code of the City of New York—"Foundation walls shall be construed to include all walls and piers built below the curb level or the nearest tier of beams to the curb, which serve as supports for walls, piers, columns or other structural parts of a building or structure."

PLASTERING.

Sometimes I have differed with other builders, but I am a firm believer that when a ceiling on wood lath is very wet it should be

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figured as to be taken down and replaced, because sooner or later there will be trouble with it, for the lath will swell and clinch will be broken. On metal lath there is no danger of it falling, simply allow to repair. With walls it is different; the water is generally only on the face of the plaster, has not penetrated except possibly to a slight extent; besides all stud partitions have a plate at top which leaves no opening for water to come through. If a ceiling is of fireproof block or concrete construction, it should be tested and if sound it will dry and remain so and no uneasiness will be caused. In Public Buildings, School Houses and places where a large number of people assemble, if a ceiling is wet it should come down for the reason that no chances should be taken and it is better to have it taken down than possibly have some one injured, as these ceilings are generally high. No doubt this will raise some question, but I find that when a builder has to do the work for a Company, that builder has to take the ceiling down.

In a recent case where I represented the insured in the settlement of a loss a very interesting question arose. Fire had done considerable damage to the posts, girders, beams and flooring. On one of the floors over which there were large iron tanks resting directly on the floor, the occupants who owned the tanks, had no insurance and stated to owner the tanks were all right and as soon as building was put back they were willing to start paying the rent. The beams and flooring directly under tanks were burned and had to be removed and replaced; to do this it was necessary to break connections to tanks and raise them. This cost considerable money and had to be figured as part of loss on building, and was finally allowed by the interested Companies.

Many interesting questions come up in replacing a building, as to what disposition should be made of the stock debris. I know it to be a fact whenever a builder is called in to replace the building he has to move the stock debris in order to replace his work and eventually has to remove it from the premises. A builder in estimating loss should include an estimate for removal of stock debris, keeping said item separate for decision as to who is to pay for it.

Builders representing Insurance Companies should be ready to show the insured's builder the short way to do his work; for instance, on a recent trip to one of our Southern Cities, there came up a question on plumbing; the soil lines throughout building were of 4-inch galvanized wrought iron pipe with screw joints. This particular building was very tall and the lines were damaged and warped

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on the first floor. The plumber insisted that he would have to begin at the top and unscrew, taking out the connections as he came down, and as there were sixteen upright lines it meant quite a large expenditure of money. In this particular city, and also the principal cities of the United States, the Building Department would not allow a union connection in the pipes, but when I proved to him that I could procure for him pipe threaded right and left there being space enough to allow spring to put in pipe, or by using a Tucker connection, the work could be done without removing lines above first floor, he very readily agreed with me but stated it would be the first time to his knowledge that the same would be used in that section of country.

In conclusion, I believe it to be for the best interests of both the insured and the Companies, to have their estimates made by men who, by years of experience in the replacing of building losses, have made a careful study of the effect of fire and water upon the various materials.

XXI ASCERTAINMENT OF MACHINERY VALUES AND LOSSES

JOHN HANKIN, Consulting Engineer

REPLACEMENT VALUES.

In this world of men and minds there should be many original ideas, but as long as there is no Thought Exchange or Board of Idea Underwriters for indexing and separating the new from the obsolete, and for the proper classification of ideas, estimates and appraisals will be necessary.

No transaction between seller and buyer is satisfactory unless there is a mutual advantage from it. No business is or can be successful if the relation between it and its customer is not satisfactory. Essentials to success are respect for the property and rights of others. This applies to the appraising of machinery values as much as it does to the buying and selling of any commodity.

The production of foundry and machine shop products is the greatest industry in the United States and is an index of the amount of labor employed. The machinery building industry closely indicates existing or approaching conditions in all other industries, machinery being the basis of all manufacture.

In approaching machinery values we are confronted with so many angles from which the unit must be considered that the subject becomes most perplexing and difficult.

First—Must be considered the character, quantity, quality, and accuracy of the machine's product.

Second—The market value of the materials of which the machine is made.

Third—The material from a workable standpoint must be considered, as brass, bronze, composition, or cast iron, are much freer and more economical working metals than malleable or wrought iron, cast or tool steel.

Fourth—The proportion of machined or finished parts must be considered apart from the unfinished.

Fifth—The design of the machine and its parts must be carefully considered. Especially does this apply to the machined parts, as all cylindrical parts, regardless of their composition, are more readily machined than is the same material in any other shape.

Sixth—The weight, bulk and manner of assembling and transporting the machine must also be considered.

Seventh—The quantity, size, weight and design of the various parts, and the time required to assemble the complete machine. If the demand is such as to warrant the maker preparing drawings, patterns, dies, jigs,

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etc., for the manufacture of the machines in large quantities, the cost is materially reduced. This is best illustrated by the selling price of an automobile by one of the large manufacturers.

For the purpose of this paper, machinery may be divided into two classes:

First—Foundry, blacksmith, boiler and sheet metal work requiring little or no machining.

Second—Machine shop work requiring one or all of the above classes as a basis on which expert workmanship will be necessary to produce a finished machine.

The replacement value of the first class can be reasonably fixed at a pound price ranging from $2\frac{1}{2}c$ per pound and up, in some cases where the casting is very thin and difficult to cast, it may cost 25c per pound, but the average foundry charge for best quality gray iron may be fixed at approximately 6c per pound, the greater the bulk the lower the cost; after fixing the pound price and the total weight of the unit, the replacement value can be reached. To estimate the replacement value of the second class requires a familiarity with the cost of machining and assembling, and with the several characters of material and workmanship of which the particular machine is composed. (January, 1916.)

As an illustration: Cast iron foundry work requiring no machining or labor outside of the foundry has a value of $2\frac{1}{2}c$ and up per pound while if machine work is necessary the cost may easily exceed this many times.

It must also be considered whether the machine possesses only patented attachments or is patented as a whole, and whether it is of domestic or foreign make. If the latter, then must be considered the lower material and labor cost, plus transportation and duty, as against a higher domestic cost. As an instance of how a limited demand affects the selling price of machines, I want to cite an actual case of two patented machines, each weighing 12,000 pounds. Call them A and B.

Machine A with a shop cost of \$600 sells at \$2,300.

Machine B with a shop cost of \$1,400 also sells at the same price.

Machine A is a heavy compact machine, occupying but thirty square feet of floor space, 80 per cent. of its value being in cast iron bulk, the balance or 20 per cent. being labor. The cost is divided as follows:

Material	\$480
Labor	120

\$600

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Although this machine stands alone and is in a field by itself, the average demand for it in the past ten years has been less than one machine per year, while the preparatory cost, such as drawing, patterns, special flasks, etc., is just as great as though the demand were one per week. In cases similar to the above, returns that will warrant the original investment are discouragingly slow, and the maker, as a matter of self-protection, must secure what to the uninitiated are apparently large and unreasonable profits.

Machine B, while not patented as a whole, possesses several patented attachments that give to the maker desired talking points. As against Machine A, the field for B is large, but the competition is also large and very keen. Each maker believes that the patented features of his machine more than counterbalance those of his competitors. This machine contains many parts, moving at high speed, and occupies 100 square feet of floor space. As against Machine A the material represents but 40 per cent. of its shop cost, the balance or 60 per cent. labor. The cost of B is made up as follows:

Material	\$560
Labor	840
	\$1,400

Again, the shop cost of the ordinary return tubular boiler is approximately as follows:

Material	Labor
$\frac{2}{3}$	$\frac{1}{3}$

while for steam engines, particularly the high speed class, it is the reverse:

Material	Labor
$\frac{1}{3}$	$\frac{2}{3}$

A most important item and one which sometimes proves to be the greatest proportion of a machine's replacement value to the user is the cost of marketing. This in itself on some machines represents many times its shop cost.

Depreciated value is influenced by so many causes, and in so many ways, that it is difficult to describe, even on a basis of ordinary wear and tear; it is rare to find two manufacturers of the same class of machinery who agree, differing on this item alone as much as 50 per cent. for five years' use. Very often two minds considering depreciation will reach widely different results, for the reason that one may view it only as a resale proposition. He sees it at

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the price it would bring in the second-hand market, where, so to speak, it has the information painted on it that it has been through a fire.

As a further instance of the different views as to values, I cite the action of the owner of a successful jobbing machine shop in northern New York. He refused to recognize such a thing as depreciation, and wishing to purchase additional machinery, journeyed to a nearby town and purchased a few machine tools, the age of which was more of an unknown quantity than that of Ann. The employees of the railroad over which it was shipped, not having the same insight as to values as the new owner, mistook it for junk, and when it arrived at its destination it was junk, and required the assistance of the Court to clear the situation.

One manufacturer (having a reputation for excellent care and up-keep of his machinery), making among other things a line of paper bag machines, makes it a practice to renew a certain class of his machine tools every five years, believing that increase in quality and quantity of output, with greater economy of operation, plus the salvage secured for machines well maintained during five years of careful use, fully compensates him for doing so.

Another manufacturer has fixed the useful life of his machine at twenty years, and still another at forty, each believing that his particular class of machinery would warrant operation for that length of time.

This, however, can only be based on ordinary wear and tear, it being possible (examples of which will be mentioned later) for machines to become practically obsolete in less than five years.

On the other hand, as examples of longevity of some pieces of machinery there are in use today in the engine-room of a New Haven (Conn.) factory two horizontal steam engines of 45 and 28 horsepower, respectively, both of which were built about 1855, and with the exception stated below, have been in constant use since their installation; the larger of the two, a Corliss engine built under the original Corliss patents, was installed in a lumber mill, where it passed through a fire undamaged. The present owner purchased it from the original buyer in 1865 for \$50; in 1902 it passed through a second fire, and was then stored in a vacant lot for about one year, where it was visited by vandals, who carted away its brasses and removable parts. It was then repaired, missing and worn parts replaced and renewed at an expense of \$300.

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I also cite a Cornish pumping engine of unknown make in the Shipley Colliery Company's coal mine near Derby, England, which in 1912 had been in satisfactory operation over 100 years.

The manner of reaching the percentage of depreciation and the extent properly chargeable to any unit or class of machinery is as variable as the machines themselves. This variation is further augmented by the many angles from which it is approached by men of different minds. Broadly, it may be stated that depreciation embodies the following: Use. Abuse.

Improvement in material, in design, in output, and in economy of operation of later and more modern types.

- We are told "man that is born of woman is of few days and full of trouble."

Paraphrasing: "Machines that are made by man are of few days and full of depreciation."

It has been said that man is no sooner born than he starts hot-foot for the grave. The moment a machine is completed it starts on the road of obsolescence to obsolescence, to its grave, "the scrap heap." Today we live, tomorrow we are scrap. "Morituri salutamus."

Speaking a good word for the lowly, and that the very often despised scrap may be elevated to its proper social position, it is interesting to note that our federal government in 1912 created in the Department of the Navy the office of scrap expert, who estimates the salvage of metal from the scrap in the United States at nearly \$60,000,000 yearly. The value of the scrap accumulated and sold by three railroads in covering a period of two years is as follows:

	N. Y. N. H. & H. R. R.		Penn. R. R.	N. Y. C. & H. R. R.
	1914	1915	1914	1915
Old metals			\$780,000	
Locomotives and wood passenger cars sold "as is"	\$784,912	\$931,861	114,326	\$2,000,000
Oil barrels			22,439	
Waste rubber			15,222	
Waste paper			19,211	
Total value	\$784,912	\$931,861	\$951,198	\$2,000,000

There are no hard and fast rules to guide us in the matter of depreciation regardless of how caused. The argument so often met, that a "sum equal to the amount usually charged off for depreciation, has been expended for maintenance and consequently offsets depreciation," is not applicable in all cases.

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It is true that money expended to maintain a machine at highest efficiency tends to minimize depreciation, but an expenditure for repairs which when completed leaves the unit in an efficient, but patched condition, offsets but a small percentage of depreciation. Expenditure that increases the machine's output or economy of operation adds to the original investment, but does not offset depreciation, there being certain depreciation on practically all classes of machinery that cannot be compensated for, by any amount expended, that falls short of replacement.

Depreciation by reason of obsolescence, or by fatigue of metal, cannot be compensated for by maintenance. As proof that fatigue failure of metal is a factor in the life of machinery, will say that duplicate machines working for twenty years under like conditions have collapsed at similar points within a few weeks of each other, due to no other reason than metal fatigue. Power plants particularly depreciate from this cause. Many engine breakdowns and boiler explosions are undoubtedly due to it.

As an illustration that improvement in product is the cause of greater depreciation than ordinary wear and tear, consider yourself the owner of an unused automobile of any make.

Concede that it has not been exposed to outdoor atmosphere conditions since its purchase, but is of the 1910 vintage. What is its value today? All due to being superseded by machines having improved features that relegate the unused machine to a back seat. Electric generators might also be quoted as a radical illustration.

Again, there is the distinction between used and abused machinery, it being possible for abuse to cause greater depreciation than ordinary wear and tear or that due to obsolescence.

One manufacturer, having in view cheaper help and increased output, will tolerate abuse of machines that would merit dismissal from another. Depreciation does not affect all machines equally, many high-speed machines having a replacement value no greater than a slow-speed machine, will depreciate more rapidly than a slower machine. As an illustration, compare a high-speed printing press, knitting or automatic screw machine with a slow but powerful stamping press or rolling mill. In the former the greater value lies in the rapidly moving parts created by skilled labor; in the second the value lies in the weight or bulk, the labor of cost per pound being very small when compared to the whole value. And since the slow

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moving or wearing parts are but a small portion of the whole in the latter or slower moving machine, the depreciation will be less than in that of the higher speed machine.

In many instances the depreciation is greater when the machine is at rest than when it is in motion. This may particularly apply to deep well pumps, where corrosion is greater, due to the settlement in the water of some active corrosive agent, which, because both water and pump are at rest, possesses greater corrosive energy on a smaller area than when the pump is in motion. Instances are known of new pump rods corroding while at rest to such an extent as to cause breakage of rod and suction pipe shortly after starting.

The writer recalls a claim for a new metal lining for a dry room based chiefly on corrosion damage. It was conceded that there was a large loss by corrosion, due to atmospheric conditions or the difference between "the high temperature inside and the lower temperature outside," causing the atmosphere to condense on the metal and thus start corrosion, which had been quietly going on for years, or from the moment of its installation.

Steam power plants, especially, unless unusual care is taken when laying them up to prevent corrosion, will depreciate more rapidly at rest than in use. External corrosion in a boiler that is kept constantly in use and consequently hot is almost impossible, as any moisture brought in contact with same is immediately evaporated, while if shut down and permitted to cool corrosion immediately starts at the point where the shell leaves the brick work and at every point where soot, dust or any moisture holding substance has gathered. Again, corrosion does not affect all metals equally. This includes iron and steel, regardless of form and shape. This is particularly applicable to boilers, ammonia and water condensing coils. While it is an unsettled question as to the advantage that iron possesses over steel in this respect, both having their advocates, it is generally conceded that depreciation of steel is greater than that of iron under similar exposed conditions, depending on the purity of the metal and impurities in the water which vary with each locality.

Another factor in depreciating power plants is that of permitting greasy or oily returns to re-enter the boilers with the feed water. These added to the sediment or scale which very often gathers over the fire surface, prevent the water from absorbing the heat units, causing the metal to become overheated, blister and sag, thus creating a weak spot in the boiler, which, if not remedied, may result in

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explosion and serious loss. These conditions, while not so serious in other portions of the power plant, have an appreciable effect in hastening the depreciation and in decreasing the life of the plant as a whole.

Instances are known of oil or grease baking to the depth of about one-eighth of an inch, due to its entrance with the feed water. Blisters nine inches deep covering fifteen square feet of the shell have resulted from this cause, necessitating the replacement of the sheet at a considerable expense and inconvenience to the operation of the plant. Air receivers have been known to explode as a result of admission of oil or grease sufficient to coat the interior, which, having been brought to a temperature approximately 500° F., have ignited and exploded. Explosions of this character are assisted by the great air pressure in the tank. In one case the pressure was eight times the atmospheric pressure of 147 pounds, or 117.6 pounds gauge pressure.

Instances of oil igniting at 270° F. under a pressure of 65 atmospheres or 955.05 pounds gauge pressure would indicate the higher the pressure the lower the temperature of ignition.

Valves used under high pressure often depreciate rapidly from the erosive action of the steam, causing what the operating engineer terms wire drawing, or steam cut, and often making necessary the removal of the parts or the valve itself (depending on the type installed). If the latter course is necessary the expense of such removal might readily represent a considerable percentage of the replacement value of that portion of the equipment.

Unexpected depreciation due to obsolescence may reduce the replacement value of a machine much more rapidly than would result from ordinary wear and tear. One of the best examples of this is a group of steam engines in a power plant of one of the Edison companies. The engines are large and well designed and are highly efficient. They are today as good as new, yet they are not used for the reason that the operating expenses of a turbine plant under their conditions are enough less to warrant abandoning the older engines rather than to operate them. At the time these engines were installed this condition was not foreseen.

A steam plant may in a similar manner become useless on account of the introduction of water power by long distance electric transmission. The failure of the natural gas fields in the Pittsburgh district rendered useless glass factories costing millions of dollars.

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*The process of steel making following the Bessemer invention made necessary the abandonment of expensive furnaces and machinery equipment, the changes in the making and handling the product necessitating not only the creating of machinery of new and heavier design, but its rearrangement on new and modern lines to fit the changed conditions and to take advantage of the more economical methods of operation which were absolutely necessary if the manufacturer wished to remain in business.

By the introduction of high-speed steel, millions of dollars' worth of machine tools were made practically useless. Cheap steel changed the manufacture of rails, sheets and shapes making possible today that which had seemed impossible yesterday and making necessary radical alterations in some plants and the abandonment of others; all of which not only affected the machinery equipment, including foundations, pattern drawings, etc., but the very buildings in which they were contained. Many of these buildings were, for various reasons, incapable of alteration to suit the changed conditions.

An example that will be brought home to many is that of the famous "Fall River Line" side wheel steamers, "Pilgrim" and "Puritan," known 25 years ago as the "Queens of Long Island Sound."

The "Pilgrim" was laid up after twenty and the "Puritan" after fifteen years' use, the owners considering that in view of the greater economy in coal consumption of propeller type of boats over the side wheelers it would be inexpedient to spend the \$250,000 necessary to overhaul the machinery equipment regardless of the fact that their total replacement cost at this time is in excess of \$2,500,000; in other words, the obsolescence of 10 per cent of their value makes it necessary to scrap the remaining 90 per cent.

Hundreds of examples could be cited of capital, the value of which has been destroyed by changes in the art in which it was invested, by the shifting of population, by the unexpected extinction of natural resources, or by other changes in conditions which were not foreseen.

CORROSION OF STEEL AND ITS CORRECTION.

The following extracts are taken from a paper read at the College of Applied Science, Syracuse University, Syracuse, N. Y., December 17, 1913, by J. T. Hay, chief metallurgist and chemist of the Stark Rolling Mill Company, Canton, Ohio:

*Matheson, Ewing, M. Inst. C. E., *The Depreciation of Factories*, pp. 46-47, London, 1910.

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'Corrosion or the rapid rusting of iron and steel may be considered as an effect of the combined action of water and oxygen, or in a broad sense, of moisture and air.

Both air and water may contain elements which will stimulate or accelerate the corrosion. The purity of iron has a marked influence on the rapidity of corrosion. The quantity of impurities must not only be very minute, but those few elements which it is impossible to remove entirely must be absolutely homogeneously distributed."

As an illustration of the effects of corrosion on metals varying in composition the following is quoted from the *Metal Workers* of January 16, 1914: .

SERVICE TEST OF COPPER BEARING SHEETS.

Results are published of a service test of sheets made by the G. Drouve Company, Bridgeport, Conn. The company states that in the autumn of 1912 it conducted an acid test of various rust-resisting sheets, and later made a comparative service test which was concluded in October, 1913, and which made a similar showing. Three trays or pans of uncoated black sheets were placed on the roof of a building on November 5, 1912, and were taken off the roof October 9, 1913. The losses by corrosion are indicated in the figures below:

	Material A
November 5, 1912.....	54 1/2 oz.
October 9, 1913.....	36 oz.
Loss	18 1/2 oz.
Percentage of loss	34%
	Material B
November 5, 1912.....	63 oz.
October 9, 1913.....	36 1/3 oz.
Loss	26 2/3 oz.
Percentage of loss	42 3/10%
	Material C
November 5, 1912.....	61 oz.
October 9, 1913.....	32 oz.
Loss	29 oz.
Percentage of loss.....	27 1/2%

Pan A was made of copper-bearing sheet steel, while Pans B and C were of steel made in open-hearth furnace by process aiming at a minute content of impurities.

The analysis of the three steels are given in the following table:

	A	B	C
	per- cent	per- cent	per- cent
Carbon	0.13	0.025	0.025
Manganese	0.40	0.038	Trace
Sulphur	0.027	0.030	0.029
Phosphorus	0.00	0.005	0.004
Silicon	Trace	Trace	Trace
Copper	0.29	0.17	0.04

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Iron is more sensitive and has the power of varying its crystallization or form of structure in a greater degree than any other metal. The manufacturers have learned that the whole art of producing corrosion-resistant metal consists of freeing it of its impurities and producing the type of crystallization desired. Because of the extreme sensitivity of iron great care must be used in its physical treatment. The strains produced in rolling, unless removed by careful annealing, will generate active corrosion. These strains are caused by excessive speed in rolling or by extreme pressure in breaking down the metal.

German silver is a composition or alloy metal of copper, nickel and zinc. Owing to the danger of undesirable crystallization in extreme heating it is cold rolled, an allowance being made of one-tenth of an inch reduction in thickness for each pass through the rolls. The pressure of the rolls so hardens the metal as to make it necessary to anneal between each pass and to pickle in order to remove the scale resulting from the annealing.

ASCERTAINMENT OF LOSS.

Cast iron is more susceptible to damage by unequal expansion and contraction than any other metal, fractures often occurring from the moment of manufacture by reason of being exposed to the atmosphere too quickly after the metal has been poured into the flask, or by exposing the piece unevenly; that is, leaving a portion of the casting protected by a layer of sand, permitting another part which is exposed to atmosphere to contract more rapidly than the protected part, thus causing a fracture, which is either ignored, filled with a plastic material called filler, welded, or as frequently occurs, is condemned to the scrap to be remelted.

We are told that there is no such a thing as cold, everything starting with heat, the difference being in the varying degree of heat. As an example, liquid air when placed on ice will immediately start to boil. Along this line all metals are hard, the difference being in their varying degree of hardness.

"It has lost its temper" is a statement often made regardless of whether the material is babbit, cast brass, copper, composition, alloy or gray iron castings, wrought iron, machine or tool steel, when as a matter of fact only the last named metal is capable of being tempered, while a certain degree of hardness may be applied by heat treatment, to all the other metals mentioned, except babbit, cast

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brass, copper or alloy, it is but a surface hardness, its trade name being "case hardened," and is in no sense construed by the trade as being tempered.

The usual way of tempering steel is to heat the article to proper temperature and then to plunge that part to be tempered into cold water, removing it while a portion of the article retains sufficient heat to draw the temper to the point desired. This is indicated by the color it assumes, and when reached the article is submerged in cold water and allowed to remain until cold. The greater the length of time elapsing between its being heated and finally cooled in the water the lower its degree of hardness.

In order to effect this temper a high temperature will be necessary; any temperature that does not evaporate the lubricant or carbonize the paint or woodwork surrounding the tempered material will not affect the temper, except it be in very delicate springs or small keen edge tools, and then it is only a possibility rather than a probability.

The fixing of damage varies with each machine and its use. If the loss is by water and consequent corrosion only, then must be considered the quality of the metals composing the machine, their susceptibility to corrosion, and the process and labor necessary to remove same; if the machine has been in direct contact with flame or has been subjected to a high degree of heat, then must be ascertained to what extent. Of great assistance to reach a conclusion is to note the conditions of surrounding materials which are more susceptible to heat than the machine itself.

If the loss be heavy bulky machines, the susceptible parts should be carefully examined, which, as a rule, are the brass oil cups, the caps of which should be removed to ascertain if any lubricant remains, and if so, its condition, if any serious heat has affected that particular part of the machine the lubricant will have thinned and passed on to the bearing and evaporated. If the bearings are of babbit metal and have been subjected to a high temperature the metal will melt and flow out of the box; if there are any delicate springs, examine same to ascertain if temper still remains. While these parts are excellent guide posts as to the extent of the damage a total loss of any one or all would not necessarily mean a very material loss to the body of the machine or to the replacement cost. The claim is often made that a machine, by reason of having been heated

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and then suddenly cooled, has deflected from the original lines; in such cases a careful examination of the painted and lubricated parts should be made.

If the machine or any large part of same be of cast iron and has been subjected to a high degree of heat and then suddenly cooled by water, causing sudden contraction, fractures are liable to result, and should be searched for. Cast iron frames of light design, cast iron pulleys, and engine fly wheels are especially liable to fracture, which usually takes place in the arms of the pulley or wheel.

As straws indicate the direction of the wind, so does the condition of materials in close proximity to each unit have a bearing on the measure of damage. For example, if the machine's finish is such as varnish, paint, etc., give; if grease or any other substance used in manufacturing the machine's product or the lubricant used on the moving parts of the machine, such as bearings, gears, etc. (this generally exudes at some point of the bearing) or if present, can be found in the interior of the bearing or on the gear teeth of the machine (all of which would be consumed at a temperature very much lower than that which will seriously damage the machine) remain, it is evidence that the metal has not deflected from its original lines and consequently has not suffered a very serious loss. To assist in reaching a conclusion under these conditions the lowest approximate melting, boiling, evaporating, flashing, ignition, and carbonizing points in degrees of Fahrenheit of several materials common in the manufacturing world are given; the blank spaces will give individual opportunity to add data that future information and personal experience may give.

OILS, ETC., AS INDICATORS OF DAMAGE.

FLASH TEST.

The flash point of an oil is the lowest temperature at which the vapors arising therefrom ignite without setting fire to the oil itself when a small test flame is quickly approached near its surface in a test cup and quickly removed. The flash point of lubricating oil is higher than the boiling point, while that of alcohol, benzine, kerosene, etc., is lower.

FIRE TEST.

The fire point of an oil is the lowest temperature at which the oil itself ignites from its vapors when a small test flame is quickly

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approached near its surface and quickly removed. Since the fire point is always above the flash point, the fire point value becomes of minor importance for this paper.

EVAPORATION.

Starts at a comparatively low temperature and increases proportionately, its maximum under normal conditions being greatest at the boiling point. Fire damage would remove all traces of lubricant long before actual damage to the metal takes place.

Approximate Boiling and Flashing Points in Degrees of Fahrenheit

	Boils	Flashes
Alcohol	173	.....
Benzine	176	.....
Camphor oil .....	.....	131
Cotton seed oil .....	.....	338
Gasoline	158	.....
Lard	m.....	464
Kerosene oil	302	110
Linseed oil	597	601
Lubricating oil, (light machine).....	.....	300
Lubricating oil, (heavy machine).....	.....	500
Olive oil .....	.....	419
Oil of turpentine.....	315	95
Paraffine .....	.....	317
Petroleum .....	.....	70
Sulphur	800	.....
Tar .....	.....	119
Whale oil	630	.....
Wood spirits (methyl alcohol).....	150	32

Approximate Melting Points in Degrees of Fahrenheit of the Following Substances

	Melts
Antimony	1150
Aluminum	1157
Alloy (lead 1 part, tin 1½).....	334
Babbitt metal	750
Beeswax	151
Bismuth	504
Brass, bronze, etc.	1692
Copper	1929
Fusible plugs used in steam boilers.....	383
Glass	1832
Gold	1913
Iron, cast	1922
Iron, wrought	2732
Lard	94
Lead	618
Nickel	2600
Platinum	3110
Steel	2372
Silver	1733
Solder, half tin, half lead.....	370
Sprinkler head solder.....	165
Sulphur	239
Tallow	92

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Tin	446
Type metal	700
Wax	142
Zinc	779

Approximate Carbonizing and Ignition Points in Degrees of Fahrenheit of the Following Substances:

	Carbonizes	Ignition
Coal mixed, small and lump:		
Anthracite		572
Bituminous		
Coke		482
Charcoal		392
Lignite		302
Ink, Printers'		
Japan on metal		
Japan on wood		
Leather belt	275	.....
Leather rawhide	300	.....
Paint on metal		
Paint on wood		
Rubber live		
Rubber belt		
Rollers, composition or printers'		
Varnish on metal		
Varnish on wood		
Wood		

Paint or varnish on metal or wood will blister even in summer temperature if the wood has not been properly dried and moisture removed, or if the first coat has not been properly dried or applied. The blister when opened by a knife point generally frees the cause of the blister, which usually proves to be sap from the wood or imperfectly dried first coat.

Blisters under these conditions do not indicate excessive temperature.

ELECTRIC MOTORS AND GENERATORS.

Electric motors and generators are easily damaged by water or high temperature, regardless of whether in direct contact with flames or not, the evidence being a disintegration of the insulation. This cannot always be assumed to have occurred to the fields and armature even though the insulation to the exterior wires is consumed, this condition very often existing when both fields and armature have escaped serious damage. Motors and generators of old make are more susceptible to water damage than are those of modern type, the superiority of which is due to improvements in the system of water-proofing or what is termed impregnating as a protection against moisture in any form. As a matter of fact, the modern motor or generator will stand contact with water even to the extent

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of being submerged for several hours, and yield to a reconditioning treatment, embodying baking and revarnishing of the fields and armatures. As an instance, a street car electric equipment which through accident in handling fell from a Jersey City dock and was submerged for several days in the salt water of New York Bay, after being recovered was reconditioned by baking, cleaning and varnishing to a condition equal to that of new at an approximate cost of 25 per cent. of its replacement value. Many instances of electric motors located in the bottom of elevator wells or shafts that owing to their location have been quickly submerged by water used to extinguish the fire, although covered by water for days, have been recovered and reconditioned by above process and at approximately the same rate of cost to its replacement value.

Ascertainment of loss may be reached by apportioning to the parts affected, according to the following approximate percentage of replacement cost:

Frame, base and bearings.....	18%
Armature, consisting of shaft, computator, etc.....	34%
Fields	48%

Owing to the greater economic condition under which motors and generators are manufactured as compared with cost of handling in the general run of electrical repair shops, it is possible for conditions to be such (especially in the case of small motors, even where the frame is intact), as to make inadvisable rewinding.

Rewinding, baking, varnishing, etc., of armature and fields may be approximately fixed at two-thirds of their replacement cost apportioned as above.

PRINTING PRESS.

The writer recently assisted in the appraisal of an offset lithograph printing press valued at \$5,000. It was claimed that there had been sufficient heat to warp the frame and cylinders, together with many delicate and expensive working parts to the extent of \$2,400, which claim when submitted to the umpire was increased to \$3,000. It was pointed out to the assured's appraiser and the umpire that a temperature necessary to warp or deflect either the cylinders or the frame would be far in excess of that required to injure the more sensitive parts. These were many, and not one showed the slightest evidence of fire damage.

Insured's attention was called to the condition of the varnish on the receiving and delivering boards, there being no evidence of exposure to any but normal conditions. This was further strengthened

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by the perfect condition (so far as fire damage was concerned) of the bristles on a revolving dusting brush; the oil in and around the bearings; the heavy grease on metal driving chain; the printer's ink in the fountain; the cheese cloth dampening rolls; the live rubber carrying belts; the live rubber rolls; the rubber blanket, and the engraved zinc plate.

It was called to their attention that at 240° F. rubber loses its elasticity, which it will not recover unless of better quality than the ordinary commercial rubber. At 300° F. it becomes viscous, and at 400° F. it becomes pasty and will not again resume its original condition, all of which was ample evidence that not only had the press escaped any direct contact with flame, but had not been exposed to a degree of heat sufficient to injure the parts most susceptible to damage, any one of which would have shown unmistakable evidence of serious damage at one-fourth the temperature required to damage the frame or cylinders on which the large claim was based. Demonstrations and argument, however, proved of no avail, the umpire awarding a damage of \$2,875, or \$475 more than the assured's original claim.

This was so directly contrary to facts and conditions and on its face was such an unjust award that I requested the opportunity of making the repairs at the value fixed on same by myself, plus the additional cost of removing to our shop the press after reconditioning to be again taken down and reassembled in the premises to which the insured had by force of circumstances been compelled to move.

The cost was added to by our being compelled to buy new parts, which the assured claimed were lost or taken by employees and held as hostage by them for moneys claimed to be due for services rendered. In view of all the circumstances, it was deemed advisable to comply with their demands and pay the amounts claimed for the parts in their custody, which after all did not secure all the parts needed, it being necessary in order to complete the press to purchase additional parts from the manufacturer before the press could be completely reassembled and made ready for the final test, which was made by accepting and filling an actual commercial lithographic order, the work being done in the presence of two expert printing-press machinists, two expert lithographers and their regular helpers, one expert press-room foreman, one representative of the manufacturers of the press, our own employees, the writer and the assured, the latter finally O. K.'ing the press and its product.

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The cost of reconditioning plus the two removals and one-half the cost of expert witnesses, but exclusive of cost of lost parts, amounted to \$492.06. The total cost, including the replacing of parts for which the fire was in no way responsible, and the cost of expert witnesses, was \$941.09.

An interesting sequel to this case is that the assured's appraiser, acting for his employers and with the full knowledge as to the limitation of parts replaced, purchased the press, and so far as we know is operating it today.

SEWING MACHINES.

In the case of a sewing machine, ascertain whether the thread is still intact or consumed; if the needle, which is a good barometer of the damage suffered, has lost its temper, which can be readily ascertained by forcing it out of the straight line by either pencil or thumb-nail, then suddenly letting go—if it returns to its original position its temper is unaffected; ascertain if the tension or any other delicate spring connected with the machine has been affected. The leather belts and wood tops of power tables are good indicators of the heat through which they have passed; failure to blister the varnish or carbonize the wood indicating insufficient heat to injure the metal. The fact that the table-tops are a total loss does not indicate that the heads are in a similar condition. In cases where the heads are a total loss, there usually remains a salvage in parts to be reclaimed from the heads and in the cast iron table-legs and transmitters that is far in excess of the scrap value.

The writer was recently interested in ascertaining the loss to a quantity of copper dies, the contention being that the heat to which they had been subjected had softened or drawn their temper. The process of making these dies was to cold-punch the design through copper discs about one and one-quarter inches thick. It is well known that repeated operations, embodying heavy compression stress or hammering, compresses and hardens the softer composition of alloy metals. Therefore, the constant hammering or driving of the punch, which formed the design, into the soft copper, forced the metal into a more compact mass, creating a hardness greater than the larger body of the metal. If continued in, it would finally have caused the thin walls of the designs to crack. To avoid this the die under process was occasionally heated to a cherry red and then cooled or softened, thus restoring it to its original degree of hardness.

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The fact that the manufacturer of these dies found it necessary to heat and anneal them in order to secure a satisfactory and perfect die, and did so with the full knowledge that the consequence of such heating caused no damage, offset the contention of damage by any heat that does not fuse or distort the metal. This was demonstrated by reconditioning a quantity of dies and subjecting them to a test, and comparing them with an unused die and with a copper blank not yet subjected to the process of manufacture.

ENGRAVED COPPER PRINTING ROLLS.

The writer also assisted in the adjustment of a loss on copper rolls, the contention being similar to that of the above case, that the copper, having been brought to a high temperature and then suddenly chilled by water, had softened the metal so that it was reduced in value to scrap.

To meet this contention two of the rolls, which had apparently suffered the most damage, were subjected to a surface-hardness test which exceeded the normal in both cases. The difference in the degree of hardness between the two was so great as to raise the contention that one had suffered a damage. To further meet this, a new roll was ordered from the manufacturer of the ones in question and this subjected to the same test.

It was found that the new roll was many points softer than either of the two reconditioned rolls, thus thoroughly disposing of the question that the copper dies or rolls in either of these cases suffered loss by fire or water in any way, and demonstrating that brass or composition castings not deflected from their original lines will readily yield to reconditioning. Also that there is a difference in hardness between the outputs of daily mixtures regardless of their being made by the same formula, in the same foundry, by the same men and so far as they could control it, under the same conditions.

It is conceded that copper brought to cherry red and permitted to cool gradually in the air will be several points harder than if plunged into cold water; but if the article still retains its original shape and has not been fused at any point, it has not changed from its normal condition and is subject to restoration.

BRASS AND COMPOSITION OR ALLOY CASTINGS.

The design of many brass castings is such as to require a core that is difficult to extract by tumbling or by the ordinary means of file and brush. In cases of this kind many brass foundries remove

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the casting from the flask while it still retains its high temperature and throw it into a barrel of water, the temperature of the casting being sufficiently high to generate a steam pressure in the damp core, causing an interior explosion of a minor order, effectively blowing out all of the core sand and cleaning the interior at the same time. This further disposes of the contention that brass, on being subjected to a high temperature and suddenly chilled with water, changes its texture as to affect its usefulness.

All metals, and especially alloy or composition metals, are affected not only by deviation in the mixture itself, but by the lack of any fixed time schedule for feeding the various fuels and metals into the furnace. Any variation in the temperature might readily be affected by the addition or omission in quantity of any of the combustible materials from which the heat is derived; the length of time permitted to remain in the flask after being poured influences the texture of the metal; again, the texture will be affected by difference in temperature of the furnace at the time the volatile metals are thrown into the crucible or cupola.

The point was lately raised that a large quantity of composition valves had been subjected to a sufficient heat to cause the composition in the valves themselves to change its texture. A temperature sufficiently high to give such results would distort the shape of the article and fuse the metal itself.

Brass, bronze or composition castings, under certain conditions, pass through what is termed a "sweating process." In other words, if the casting is taken from the flask when only the surface has assumed a degree of hardness sufficient to retain its shape, the interior of the casting itself may be at the time practically in liquid or pasty form.

The sudden chilling of the exterior will result in the so-called sweating, which is caused by the exudation of the coarser and softer alloys (such as lead and tin), at the surface of the metal. Such is the meaning of the so-called "sweating." This in no way harms the casting, however, and can only occur when the interior of the metal itself still retains a pasty form, of a very high temperature. I repeat that any composition casting, where the outside surface of the metal was attacked first with heat sufficient to cause this result, would warp and deflect the material in such a manner as readily to convince even the layman that its only value was scrap.

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A further contention was made that the discoloration of the exterior of the valves was in itself so great as to render them not only unsalable, but practically useless and consequently of scrap value. Further, it was contended that the method proposed to remove the discoloration was injurious to the metal of which the valves were composed, and therefore impracticable and out of the question. It was pointed out to them that competitors in a similar line of business, using to all intents and purposes practically the same metal, subjected their product to the same operation which it was proposed to apply, the purpose of which was to remove foundry and factory discoloration and to give the casting a clean and, in the opinion of the manufacturer, an improved appearance. That this argument might be carried home, a quantity of valves subjected to the greatest heat were placed under hydraulic test before being disassembled and treated to the reconditioning process, the test being duly witnessed and noted. After being reconditioned and reassembled they were again subjected to the same test, which showed no change in the structure or the pressure the material was capable of withstanding. The solution and process of reconditioning followed in this case is practically the same as that used in all brass, copper, nickel, silver and gold plating establishments throughout the world.

The ingredients and proportions are shown on page 406.

ROUGH CASTINGS OR BAR STOCK.

Rough grey iron castings or rough bar iron stock, on which no labor has been performed, will suffer little or no loss by smoke and water. Any loss by fire to the former, whether by fusing or cracking is usually discernible, while extreme fire damage to the latter (that does not fuse the metal), may deflect the bar from its straight lines. This is readily restored by restraightening at a small portion of its replacement value.

PREVENTION OF FURTHER LOSS.

METAL STOCK.

Brass, copper, composition, alloy, gold, silver grey iron castings or wrought and steel bar stock in the rough, on which no work beyond cleaning has been expended, suffer little or no loss by smoke and water. So secure are they against further loss as to make inexpedient any expense to preserve same.

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This may also be said of brass, copper, composition, alloy, gold or silver castings in process where the polishing or plating finish is yet to be applied. The measure of damage is that represented by the small amount of additional labor to remove any discoloration that may have attached itself to the metal, which additional labor will be but a small portion of replacement. Any expense involved with a view of prevention of further loss on this character of stock will exceed the amount of any additional loss that can occur from smoke or water.

If the articles are completed and the finish is the base metal, machine-turned or highly polished, the extent of the damage will depend largely on its construction and the function of the part affected. Where various parts have been assembled the loss is greater than when the parts are finished but not assembled, for the reason that in addition to reconditioning of material, the labor of taking down and reassembling must be considered. Expense of applying preventive measures against further loss is warranted, unless reconditioning can be started within a short period after exposure to loss by fire.

Please note that above remarks are confined to stock articles of brass, copper, bronze, composition or alloys, and do not include finished wrought iron or steel stock.

It is customary in the metal trades which make cheap brass goods to dip such products in a denatured alcohol and flake shellac to prevent tarnish. The proportions of the bath are 1 gallon to 1 ounce, respectively. By dissolving a greater or less amount of shellac in the alcohol a stronger or weaker solution is obtained, but it should be used weak in order to dry rapidly and give an invisible film on the surface of the brass.

IRON AND STEEL BAR STOCK.

If rough and is to be either forged or machined, and on which no labor has been performed, little or no damage from smoke or water can result and the expense of preventive measures is not warranted. If in process and some machine work expended, yet still lacking the finishing process, a damage by way of increase to cost of production may readily occur. It is difficult, however, to imagine any loss under above conditions that could exceed 25 percent of reproduction cost. If completed and finish is of base metal, with a high polish, the loss will be greater, depending on the design

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and function of the part affected by the rust, which, while greater than that on composition or alloy metals, it is difficult, as stated above, to imagine the conditions where the loss would be total. The expense of prevention of further loss to stock of this character is warranted. For articles that can be readily handled the following copied from the *Iron Age*, is recommended for the removal of rust and will prevent loss by corrosion:

Removing Rust.—Articles attacked by rust can be conveniently cleaned by dipping them in a well-saturated solution of stannic chloride, 12 to 24 hours sufficing, according to the thickness of the rust. An excess of acid in the solution must be avoided. After the objects have been removed from the bath they must be rinsed with water, then with ammonia, and quickly dried. They are said then to resemble dead silver.

IRON AND STEEL STOCK.

Cold-rolled or polished bar or sheet stock should be dried as soon as possible and coated with heavy oil, grease or compound, as best suited to condition, as described on page 403.

Stove or similar hardware, bright or black, may be saved from further loss by first drying the article and then applying a coating of beeswax and benzine. This can be applied thinly. The benzine, quickly evaporating, leaves a thin film of transparent protecting coating on the metal. Another mixture is vaseline, or any good grease, thinned with gasoline to make a thin liquid, applied with a brush. If the articles are small they can be placed in a perforated can or wire basket and dipped in either of above mixtures, which should be thin enough to run freely, so that all slots and threads in tapped holes will be coated.

Protection against corrosion is most difficult in the case of quantities of small-size articles. A method which has been giving first-rate results in the case of buckles, rings and harness fittings generally may help to solve this vexed question, is cheap varnish diluted to two or three times its volume with methylated spirits. On account of evaporation, the mixture is made up as required. The apparatus consists of two oil drums, each minus one end. An ordinary five-gallon drum, 11 inches in diameter, has $\frac{1}{2}$ -inch holes punched in the bottom and sides. The other drum may be of 7 gallon capacity, of 12-inch diameter, or a 10-gallon drum, which is larger still. The larger vessel is filled about one-quarter full, and

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the articles to be treated put in the smaller vessel. The perforated drum is lowered into the liquid, immersing the articles to be coated. Withdrawing the smaller vessel immediately, the major portion of the fluid drains back again in a minute or so. To finish draining and to harden the coating, the contents are then shot out on a wire draining surface, and in fifteen minutes are ready to shelve. The process is really a cheap and effective form of cold lacquering in bulk. The articles retain their condition for a long period of time, while the coating is not in the least obvious.

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The first and most important thing to do is to remove all accessible moisture from the machine by wiping with cotton waste or cloth. If protected against the elements or seepage from upper floors, a heavy cylinder oil should be liberally applied by slushing, giving especial attention to all finished or bright surfaces. If exposed to the elements or seepage from upper floors, a heavy lubricating grease or compound should be liberally applied. These may be purchased from any dealer in machines, factory or engineers' supplies.

A compound in use for many years, and one that will resist atmosphere dampness, salt or fresh water, regardless of location or quantities, is made up as follows:

4 Parts Tallow,

1 Part White Lead,

the latter being stirred in the melted tallow. To remove, use either kerosene or turpentine, applied on cotton waste or wiping rag.

ELECTRIC MOTORS, GENERATORS, ETC.

If protected against the elements and seepage from upper floors, possible further damage is of such minor factor as not to warrant any further expense to prevent same. If, however, exposed to the elements or dripping from upper floors, the units should be protected by being covered with tarpaulins or tar paper securely weighted down or tied to the units themselves.

SMALL MACHINE TOOLS.

To keep tools clean and bright, rub a little mercurial ointment over them, which will form a moisture-resisting coating. Mercurial ointment is also known as blue butter. It is somewhat poisonous. Another good mixture to keep from rusting is made by taking:

1 Part Rosin,

6 Parts Lard,

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Heat these together slowly, till the rosin is all melted. Benzine is added in about the proportion of one pint of benzine to half a pint of lard-rosin mixture.

RESTORATION.

Restoration of cast iron, whether rough, in process or finished, is feasible in practically all cases, except when the metal has been distorted or cracked by heat, or by sudden and unequal cooling, the method of doing so varying according to size, intended use and finish. If the material is rough, on which no work has been expended, little or no damage can result, although it is possible for small articles to acquire a state of rust sufficient to add to the cost of the material at the time of damage. If the finish is to be plated, and even though a portion of the machine work has been performed, the damage may readily be less than if a machine or polished finish is intended, for the reason that the plating or finishing process would of itself remove evidence of rust. In other words, the same process and practically the same amount of labor would be required to finish, if not exposed to fire or water. Therefore, the additional labor caused by rust or discoloration adds but little if any to the manufacturing cost. Brass, bronze, copper or alloy composition, either rolled or cast, when not warped by heat or its design affected by being crushed, will readily yield to reconditioning, regardless of whether the article is in process or in a completed state.

If the article is stamped sheet metal and has not progressed too far toward completion, deflections from original lines may some times be removed by again passing the articles through the stamping press, other damage, such as abrasion and scratches, being removed by the process of grinding, polishing, plating and buffing, which would be necessary to bring the article to a finished state if not exposed to loss by fire.

Restoration of manufacturing tools is usually a question of reconditioning and replacement of parts, and necessary skilled labor to fit same and recondition parts not so damaged as to necessitate replacement.

Wood spinning chucks, solid or in parts, when not charred, even though warped and when placed on the lathe-head or spindle revolve out of true, regardless of any splitting that may take place, are in many cases capable of restoration, which is accomplished by turning the design further down on the same block. It is the aim

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of the practical chuck maker to allow ample stock to permit of this being done, if for any reason it is desired, as by so doing there is a saving of 75 percent to the owner over the original cost.

It is possible that many chucks may have already been subject to this operation a sufficient number of times as to have reached the limit that a particular chuck will stand. It is safe to assume, however, that 75 percent of all wood chucks were originally made with this re-turning in view.

Even though the chucks show evidence of splitting or have actually parted, total loss does not necessarily follow, as in many cases restoration is possible at considerably less than the original cost.

CLEANSING.

Copper, brass, zinc and the noble metals are cleaned by the suitable acids which act on them. Such cleaning solutions may be prepared for different metals as follows:

	<i>Water</i>	<i>Nitric</i>	<i>Sulphuric</i>	<i>Hydro-chloric</i>
For copper and brass...	100	50	100	2
Iron	100	3	8	2
Iron (cast)	100	3	12	3
Zinc	100	..	10	—
Silver	100	10	..	..

It is best to make two such solutions, one being reserved for a final dip, during which a strong action occurs upon the surface. As this becomes weaker it can be used for the first cleansing, accompanied by occasional rubbing with sand, etc., according to the nature of the object.

Lead, tin and pewter must not be placed in acid, but are cleaned by aid of caustic soda.

In cleansing, different metals usually require a somewhat different treatment. The surface of most metals, when clean, soon becomes coated with a film of oxide when exposed to the air, especially when the surface exposed is wet, and to avoid this it is necessary to see that they are thoroughly dried.

Before proceeding to cleanse the articles they are usually "trussed" (fastened) with copper wire, to avoid the necessity of handling them during the operation.

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The process of using above is the same as the dipping acid referred to below, the only difference being in the substitution of the solution desired in place of that described under the third operation, dipping acid.

Copper and Copper Alloy Cleansing Solution.

Caustic Potash 1 Pound,
Soft Water 1 Gallon,

Heat nearly to boiling in a cast-iron pot provided with a cover. Brush to remove any loosely adhering foreign matter, truss, and suspend for a time in the hot lye; usually a few minutes will suffice, if the article is not heavily lacquered. If any of its parts are joined with solder it should not be allowed to remain too long immersed, as the caustic liquid attacks solder and their solution blackens copper. On removing rinse thoroughly in running water. If the articles are much oxidized, pickle in a bath composed of:

1 Gallon of Water,
1 Pint of Sulphuric Acid,

until the darker portion is removed. Rinse in running water and dip in the following solution:

Soft Water 1 Gallon,
Cyanide of Potassium 8 Ounces,

Remove from the bath and quickly go over every part with a brush and fine pumice stone powder moistened with the cyanide solution.

"Dipping Acid" for Brass, Bronze or Composition.

The following process (that referred to on page 400, will remove all discoloration and will brighten brass, bronze or composition, and is commonly referred to in electro-plating establishments as "Dipping Acid." The container must be a stoneware vessel (avoid jars with lead glazing) and located in a well-ventilated room, and when not in use protect it with a cover of stoneware or glass:

First—Boil in hot potash water of one pound of soda to each gallon of soft water.

Second—Dip and wash in cold running water.

Third—Dip for an instant in a solution of one part nitric acid and two parts oil of vitrol (sulphuric acid).

Fourth—Immediately dip and wash in cold running water.

Fifth—Dip in hot water.

Sixth—Dry in sawdust box.

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Pickling Bath.

Cast iron requires to be placed in a cold acid solution for "pickle," to dissolve or loosen the oxide from its surface. The pickle may be prepared in a wooden tub or tank from either of the following formulae:

Sulphuric acid (oil of vitrol), $\frac{1}{2}$ lb. Water, 1 gal.

Cast-iron work immersed in this bath, from twenty minutes to one-half hour, will generally have its coating of oxide sufficiently loosened to be easily removed by means of a stiff brush, sand and water. When it is desired that the article should come out of the bath bright, instead of dull-black color which they present when pickled in the plain sulphuric acid bath, the following formula may be adopted:

Sulphuric acid, 1 lb. Water, 1 gal.

Dissolve in the above 2 oz. of zinc, which may conveniently be applied in its granulated form. When dissolved, add $\frac{1}{2}$ lb. nitric acid and mix well.

Removing Grease from Machinery Parts.

The following method has been substituted for the use of gasoline and other light oils, because of the scarcity of the latter: Boil the parts in caustic soda-lye (1 lb. per gal. of water), then brush while the article is still hot. Caustic soda is recommended as better than ordinary soda, since it causes the fat or grease to dissolve more quickly.

LEATHER BELTING.

Steer hides, from which leather belts are made, after being removed from the animal and thoroughly washed, are placed in vats and treated to a solution of lime and water. This is for the purpose of loosening the hair so that it may be readily removed. Care must be taken not to expose the hide too long in this solution, there being danger of burning and depreciating its value for belt purposes.

After the removal of the hair the hides are placed in vats and submerged in water, where they are permitted to remain for a period of time, varying with their thickness, and later washed. This is for the purpose of removing all traces of the lime. After this has been done, the hides are placed in one to four solutions of a tanning liquor, progressing in strength, where they remain for four to five

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months. This is for the purpose of swelling the fiber and increasing its elasticity and strength. It is then dried, and becomes rough leather.

The hides are then trimmed, separating the shoulder, belly and tail parts from the back. The nearer the center of the back of the hide, the better the quality of the leather. These centers are soaked in water until soft. The flesh side is then shaved, after which they are laid on long tables, where they are scoured, with the grain or hair side up. They are then suspended and semi-dried, and later treated to a process termed "dubbing," which consists of an application of a composition of codfish oil and mutton tallow, the viscosity and consistency of which is approximately that of vaseline. This is applied thoroughly to both sides. The stock is then hung up in a warm room to allow the grease to soak into the fibre.

While this explanation of the tanning process is brief, it is sufficient for the purpose of this paper, and is intended to show the liberal use of water in the process of tanning leather for belt and other purposes.

The leather is then placed under a severe strain in stretching frames, where it remains for about 24 hours, just under the breaking point. This part of the process requires great care, as too great a strain removes the elasticity of the fibre and makes the leather unsuitable for belt purposes. It is essential that leather belts have a certain amount of elasticity, in the absence of which the belt will break and tear. The fact that leather belts possess this elasticity, and give and take according to the atmosphere, is an advantage claimed by leather-belt manufacturers over that of rubber and fabric belts. Its ability to give and take gives to leather belts in use a greater life than used belts that are permitted to be idle for an indefinite length of time.

To be serviceable, leather belts must possess a certain amount of oil or lubricant, in order to be pliable. This grease, when the belts are subject to a wetting, is washed out, moisture taking its place, which later evaporates, causing the leather to resume its original hardness.

The life of leather belts, that possessed any virtue previous to being wet and then dried, can be restored by the use of the above-described preparation of codfish oil and mutton tallow. If the belts have suffered repeated wettings and dryings, and have become ex-

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ceedingly hard, an excellent treatment is to run the belt, at the rate of about ten feet per minute, through a tank filled with tanner's oil, which is thinner than cod oil and mutton tallow, and is heated to a temperature between 140 and 150 degrees. Care must be taken not to exceed the maximum temperature of 150 degrees F.

As an instance of leather-belt restoration, will cite the case of the sinking of a grain elevator possessing a large value in leather belts, which was submerged in the Hudson River for two weeks. When raised the belts were removed to the factory of a prominent belt manufacturer of New York City, where restoration took place, and later the same belts were again placed in service in the same elevator, in a condition equal to that of the day previous to sinking, at an approximate cost of 25 percent of the replacement value, plus a further cost of approximately 10 percent for replacing wastage due to tearing of laps while being separated, preparatory to restoration and reinstalling.

At this time it is worthy of note that salt water is more injurious to leather than fresh water.

To restore leather belts suffering from a wetting that has not been sufficient to separate the belt layers or laps, first thoroughly clean, removing all dirt, then apply castor or neatsfoot oil to both sides of the belt, using a rag or bristle brush, giving a light coat to the face and a heavier one to the back, spreading evenly. In the event of the belt getting too much of either of the above, the belt will become too soft and will slip; but this is only a temporary annoyance and it will adjust itself after being in use a short time.

Leather belts that have become saturated with oil may be restored by a surface washing of ammonia, naphtha or gasoline.

A belt dressing that is good for leather belts is not good for rubber or fabric belts.

Machine oils, soap or rosin are injurious to belts and should not be used.

The grain side of leather belts is the hair side.

Extreme water damage only, to leather belts, may be fixed at approximately 25 percent of the replacement value, plus freight and cartage to any competent leather-belt manufacturer, and the added cost of approximately 10 percent for loss in length of belt, due to tearing where laps have to be forcibly separated.

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LEATHER BELTING "WATERPROOFED"

Leather belts that have been cemented with waterproof cement and treated to a waterproofing process are not often damaged by exposure or wetting, regardless of how received, the loss from water only being limited to the cost of cleaning and applying a proper belt dressing and reinstallation, which, except under abnormal conditions, would be approximately 10 per cent of its replacement value. Reference to bills will indicate if belts are waterproof. All waterproof belts are stamped with a steel die, Waterproof.

RUBBER BELTS.

Rubber belts are especially designed to withstand water, and consequently are essentially impervious to damage from that cause. The gum rubber entering into their construction is very susceptible to damage by heat, and is difficult of restoration. Loss, if any, by heat can only be based on decreased length of useful life.

FABRIC BELTS.

What has been said of rubber belts largely applies to fabric belts, except that not all fabric belts are waterproof. Waterproof belts are guaranteed against exposure to all weather conditions, steam and acid fumes (except nitric acid), water in any quantities and a constant temperature of 100 to 150 degrees F., and intermittent temperature considerably in excess of those quoted.

ELECTRIC MOTORS AND GENERATORS.

Where carbonization has occurred, re-winding of the carbonized portions will be necessary, the loss varying with the extent of the carbonization, which, however, may effect each field separately, without necessarily damaging adjoining fields. While damage to the armature does not necessarily mean a corresponding damage to the fields, or vice versa, the construction of the armature is such as to make it difficult to carbonize one portion or segment without making complete re-winding of armature a necessity.

When the damage is confined to smoke and water, reconditioning is not difficult, and is accomplished by a thorough cleaning, baking and, in extreme cases, re-shellacing or varnishing.

In cases where motors and generators have been subjected to immersion in salt or filthy water, an excellent method is to give

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them a thorough washing by the use of fresh water through a hose and under high pressure, after which give the units a thorough cleaning, baking and varnishing (see page 394).

The following extract from a letter by J. H. Bryan, of Dayton, Ohio, published by *The American Machinist*, in their issue of September 4, 1913, will be of interest at this time:

CLEANING UP A FACTORY AFTER THE GREAT DAYTON FLOOD.

"The subject of this article is a large Dayton manufacturing concern, located along the banks of the Mad River, a tributary of the great Miami River.

"The high-water marks over the entire plant averaged 12 feet, submerging the power plant and some 200 motors. March 29 the waters receded, leaving in the various shops a deposit of 5,000 tons of slimy mud, that had the bulldog tenacity for clinging to things, in addition to an acid property that was very destructive of steel and iron finished work.

"In order to retain and give the shop organization employment, the whole force of 700 men were employed, without reduction in wages, to remove the muck from buildings and machinery and to make repairs incident to the flood. In the power plant a boiler and a small engine were soon got in readiness to operate the only dry motor in the works, as a generator to furnish power temporarily for cranes to transfer motors to a central point for drying.

"The program for drying motors and generators was as follows: Suitable horizontal steam-jacketed tanks were provided, with a table moved on rollers inside of the tank for loading purposes, and the field coils and armatures were placed in these tanks and subjected to a temperature of 170 degrees F. and 27 inches of vacuum for 48 consecutive hours. At the expiration of this time a large percentage of these parts were found O. K., and those parts that showed a ground were reheated. The large generators, with armatures built on crank-shafts of engines, were liberally supplied with steam coils, especially at the bottom of the field ring, and the whole of the generator and steam coils boxed in with dry lumber, as it was found that planking was far more satisfactory than metal, owing to the fact that the lumber would absorb moisture, while with a plate-steel oven the interior surfaces would continually run water on account of the low temperature.

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"The generators were subject to a temperature of 140 degrees F. for 36 consecutive hours, and were then ready to be tested out. If no difficulties were experienced, it was fair to presume the generators were in good condition. However, in such cases it is well, before the generators are put in commission to carry a full load, to run them light for five hours or more.

"The generators and motors were all dried out as noted above, and only two motors in the whole lot gave trouble in operation.

"While these important members were receiving attention, the machine tools and all the manufactured product were taken apart and scrupulously cleaned, as the mud, when dried and pulverized, was a good substitute for flour of emery."

CLASSIFICATION.

DRAWINGS, PATTERNS, DIES, ETC.

Drawings, patterns (both master and working), moulds, forms, dies, jigs or templets, are closely allied to each other, and any depreciation in value by reason of imperfection in design, change in style, or increase in output of machines of similar character of later and more modern type, or unsalability of product, or from any cause whatsoever, affects all the above items equally.

In my judgment, the Pattern clause should include:

ALL DRAWINGS

MOULDER'S PATTERNS

of wood, iron, rubber or plaster paris.

SHEET METAL WORKERS'

patterns and templets, wood, metal and paper.

LIGHTNING DOME MANUFACTURERS'

designs, patterns and templets.

EMBROIDERY MANUFACTURERS'

designs and patterns, for hand, power and automatic machines.

CLOTHING MANUFACTURERS'

original designs and patterns.

POTTERY MANUFACTURERS'

wood and plaster paris patterns.

PAPER BOX MANUFACTURERS'

box-makers' wood forms.

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MILLINERY ORNAMENT MANUFACTURERS'

moulds and patterns.

HAT MANUFACTURERS'

wood and plaster hat blocks, wood flanges, spelter and aluminum dies, rubber and leather saddles.

METAL SPINNERS'

so-called wood chucks, which, in my opinion, would be better named if called metal spinners' patterns.

MACHINE SHOP

drawings, patterns, jigs and templets.

DIES—

cutting, blanking, forming, holding, stamping and embossing, as used by the manufacturers of articles of leather, cloth, paper, buttons of all kinds, shoes, etc.; exclusive, however, of threading dies, such as are used for threading pipes, bolts, etc.

NOTES OF INTEREST.

To the average man it is inconceivable for iron or steel chips to actually burn as so much inflammable material, but nevertheless such is possible and such incidents are of positive record. The phenomenon is explained by the fact that it can get rid of its heat and consequently gives signs of complete combustion. A large pile of chips took fire in the yard of a machine shop not long ago, and the fire was described by a witness as follows: "The chips had been put through a centrifugal oil separator, and therefore the small amount of oil remaining had nothing to do with the fire. It was a plain case of burning iron. The metal was so finely divided, and presented so much surface to the oxygen in proportion to the radiating surface of the pile that, once started by the heat from a nearby rubbish pile, the combustion proceeded exactly as in a pile of coal, only apparently at a more rapid rate. The chips when cooled were a dark blue. The pile sank about a third in height, and a lot of metal must have been oxidized to create so much heat."—*American Machinist*.

Tow (residue left when flax, hemp and jute fibres are put through cleaning process) will glimmer at 518 degrees F., and at a temperature slightly above this will burn.

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When impregnated with oils, their temperature rises spontaneously when stored, and when this temperature approximates that given above, they become very dangerous substances.

XXII

ADJUSTMENT OF STOCK LOSSES

D. C. BROWN

Assistant General Manager, General Adjustment Bureau

The subject assigned to me does not lack in comprehensiveness and to the modern adjuster of fire losses there is nothing too difficult to tackle; therefore when we pause to consider the possibilities under the title of this paper, there need be little concern as to what constitutes the particular stock damaged—for after all, everything on or under the earth, and below the heavens, and all that is contained in the air and seas, will sooner or later comprise in the raw state, or in the manufactured product—stock, subject to the ravages of the fire fiend.

To the lay mind something uncanny suggests itself when considering the qualifications of an experienced adjuster and there is no little skepticism as to his ability to pass intelligently and competently on every class of merchandise known to the present generation, and found right in the Metropolitan (New York) district. Perhaps in no other portion of the Globe of equal dimension, is it possible to find assembled in so large variety, the products of the earth, air and sea in their raw and manufactured states.

Stocks may be divided into the three classes—animal, vegetable and mineral, with their myriads of raw specimens and untold numbers of manufactured or converted products, and may be found in the hands of the original producer, the breeder, fisherman, miner, forester, gardener, or hunter, or the manufacturer, importer, commissariat, jobber, or wholesaler, the retailer or department store-keeper, and occasionally the consumer, but wherever the stocks may be, or in whose hands they may be found, the questions for the adjuster are always the same: "What was the value at the moment of the fire?" and "What is the damage?"

There is no system of adjustment known to me as mathematically or scientifically correct. A goodly number of years ago, a friend of mine sighed for a composite photograph of the fifty-seven varieties of adjusters who were then responsible for adjustments in the Metropolitan district; there were then not fifty-seven kinds of adjustments, but there were so many systems in force—and they were not all wrong, neither were they by any means all right—but

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they were sufficiently diverse and unfriendly as to make the student of ethics despondent. These adjustments resulted in lack of confidence amongst the Insurers and led more than a little to the depletion of the companies' funds and explanation of profitless periods.

It will be assumed that the young adjuster is already familiar with the preliminaries and is fully aware of the importance of a prompt examination of the damaged merchandise and the premises, and the notation of such information, data, facts and circumstances as may be available, with possibly diagrams in certain cases, to indicate the location and condition of goods and shelving, tables, racks, etc., in various portions of the premises, and last, but not least, the mental photograph which he is to carry away with him. Also that the other preliminaries, such as examination of the policies and forms will have proper attention, including warranties and permits contained in the policies, occupancy of the premises, and any other primary essentials of the insurance contract.

Having by this time diagnosed the case, it is ready for treatment. There are two methods provided in the policy for the determination of the value of the property, viz.: agreement or appraisal; and three for arriving at the amount of the loss and damage, to wit: agreement, appraisal and (at the option of the Company) acquirement and disposal of the damaged stock at its ascertained or appraised value. It should always be remembered that the happening of a fire does not effect any change in the ownership. The insured is still the owner and must never be permitted to abandon the property.

Stocks may be divided into two classes, perishable and non-perishable. For the purposes of illustration, perishable stocks comprise all foodstuffs, fibres, vegetable and animal products; this class requires immediate action to secure the proper salvage, and as a rule should be removed from the fire premises for better protection or for sale for account of the loss. This is generally covered by an agreement in writing, simple in its terms, signed by or on behalf of the insured and the insurer, and always made subject to the terms and conditions of the policy. Non-perishable stocks may embrace every kind of merchandise not already mentioned, and such cases, unless it shall appear that the stock is likely to take on further damage, should follow the usual course, and the goods remain on the premises until the sound value has been fixed and the amount of loss and damage examined into and possibly an adjustment reached.

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The next step, in fact, we should say, the first step (all of the foregoing being in the nature of preliminaries), is the determination of the value of the insured property. This involves two elements—quantity and price. The best evidence as to quantity is the merchandise itself and, hence, it follows in every case where the stock, or any portion of it, has been saved, or is in such condition as will admit of identification (even though it may represent no salvage value), it should be inventoried by the insured and verified by the adjuster. Should all of the stock be in sight or identifiable, a detailed inventory, properly verified, will be the best evidence, and in such circumstances the most reliable method, by which the quantity of stock on hand may be clearly and accurately established. In many cases, however, the entire stock is not in sight, but some unknown portion has been totally obliterated, or destroyed beyond identification; in such cases, recourse must be had to other sources of information (usually the assured's records and books of account), to establish the amount of "total loss and missing," and there will be further reference to this feature in succeeding paragraphs.

The pricing of the inventory, in the usual case, is upon the basis of cost (less all available cash discounts and plus freight and delivery charges), as shown by bills and invoices or other cost records of the insured. The true measure of value under the policy (New York Standard) is the actual cash value at the time of the loss, not exceeding what it would then cost the insured to replace the same with material of like kind and quality, and this may not always (in fact it frequently does not) coincide with the cost of the merchandise at the time it was acquired. Most stock losses involve an item of "total loss and missing," and, in such cases, the customary method is to refer to the books and records of the insured, to ascertain the value of the entire stock, from which is deducted "stock in sight" as shown by the inventory, to arrive at the amount of "total loss and missing." The books, if kept in the usual way, will show the stock only upon the basis of cost when the goods were purchased or received; hence, it is obvious the inventory of stock in sight must be upon the same basis to produce a correct result.

If conditions do not admit of the entire stock being shown by inventory taken after the fire, as previously described, the assured's books of account, assuming them to have been correctly kept, will be the next best evidence, and the adjuster with a fair working

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knowledge of bookkeeping should be able, in the average case, to obtain satisfactory verification of values from that source.

The determination of values and loss from books of account is a very broad, interesting, and complex subject, and no doubt will be discussed in detail in other chapters. No attempt will be made here to discuss it in anything more than the most general terms. There are certain features, however, which may be said to be common to all cases involving book statements or where the values are to be determined from books of account. Here are some of them:

1. There must be a starting point:—it is generally an inventory. If so, it should be carefully scrutinized (particularly for items not merchandise) with such verification of prices and computations as will satisfy you as to the bona fides of this—the opening entry. It is the foundation of the structure—Be sure you are right; then go ahead.

2. In the usual case the profit ratio is the key to a proper ascertainment of the stock on hand. The ratio is usually based upon the trading of the previous year (or period between inventories), but if conditions have changed such a basis may not be reliable. While the adjuster should always, when dealing with a book statement, inform himself as to the profit in previous periods, he should not adopt the same, unless he is satisfied it does substantial justice to every interest.

3. The ratio of profit in the preceding period will be obtained by closing the books against the inventory, i. e., the same inventory which has become your starting point, an additional reason for its proper verification. A comparatively unimportant error in the inventory might, by its effect upon the profit ratio, produce a result very wide of the mark.

4. Both the profit statement and the statement for the period ending with the fire, must contain the same factors of cost and be made up in exactly the same way.

The usual form of book settlement, being well established and generally understood, scarcely need be referred to here, except possibly to mention that among the items to be looked into and taken into account are returns and allowances, cash discounts available to the insured, and freights and delivery charges. In the case of a manufacturing establishment, there will be added labor, overhead charges and various items of factory cost, to arrive at the cost of the completed article. Questions as to the proper division of such items, as between factory cost and administration expense, will not be referred to here, as these questions more properly pertain to the specific subject of accountancy, and will no doubt be fully covered in other papers to be read before the society.

It is assumed in the foregoing that the books have been correctly kept and that the inventory, upon which the statement is based, was properly taken and truly represents the stock on hand at the beginning of the period. Unfortunately, such is not always the situation, but cases will be encountered where, for one reason or

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another, the inventory is excessive as to quantity or pricing (and sometimes as to both), and accompanied in many such instances by various other forms of erroneous and improper entry, or suppression of entry, in the books. The treatment of such cases often involves a tedious and methodical examination of records and accounts. Frequently it is work for the specialist, as the average busy adjuster (even though he might be fully qualified on the score of ability), is generally unable to devote the time necessary to do justice to such a situation. The most competent and experienced adjuster does not hesitate to call the expert accountant to his assistance in such a case.

How are we to know, asks the young adjuster, when the book statement has been inflated or the inventory padded? There is no method or rule which can be said to be infallible, but there are certain landmarks and indications, the value of which will grow upon you by experience, enabling you to recognize the case where special scrutiny is necessary or desirable.

Inflation is not often met with where the stock is all in sight, but, when it is encountered, it is apt to be a case where part of the stock has been totally obliterated, the inflation becoming part of the "total loss and missing." If your preliminary examination has been thorough, you have already informed yourself regarding the area of the burned section, size of shelving, cases, racks, etc., and the character of stock involved in the burned section, and you will probably be able to satisfy yourself as to whether the amount claimed for "total loss and missing" is reasonable. If strikingly unreasonable or apparently impossible, a detailed investigation is not only in order but imperative. Inflation in the inventory always affects the profit ratio; hence, a pronounced increase in the ratio of trading profit between inventories, if not satisfactorily accounted for, should invariably call for further investigation. It's a good time to send for your expert accountant.

Methods of inflation, as well as the means of detection, are varied and cover a wide field. The adjuster should cultivate the faculty of recognizing fraud when he meets it, but his judgment should be tempered by a conservatism which will place evidence above theory and facts before mere appearances. Intuition is a word sometimes mentioned in connection with the work of the seasoned and successful adjuster, and, frequently it is correctly applied, but his "intuition" is simply the fruit of a consistent and

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methodical application of "horse-sense" to the problems of each and every day. The adjuster finds no finer field for the utilization of the ingredient just mentioned than in the adjustment of merchandise losses.

Up to this point our discussion regarding ascertainment of values has been confined to cases where books of account, inventories or other records are available. What is to be done when, as sometimes happens, there are no records and the entire stock is destroyed? Such a situation usually means a problem for the adjuster, which he endeavors to solve in various ways. In such a case, he must carefully consider all angles of the situation and seek the best evidence available. He should always endeavor to establish a starting point. Frequently the assured can supply some record, such as a statement to his bank or to a mercantile agency, showing the amount of stock on hand at a given time. Many times, however, even these meagre records are not available and the problem is intensified. Call for duplicate bills of purchase, covering a reasonable period prior to the fire (preferably, of course, going back to your starting point—if you have one). Bank deposits, plus cash used out of the business for expenses and for assured's personal needs, will give you a line on sales. The ratio of profit to be deducted from the sales must of course be estimated. The result, while not accurate, should indicate the approximate amount of stock on hand at the time of fire, and it may also enable the adjuster to determine whether the stock was increasing or decreasing, and in other ways aid him in arriving at a conclusion. Further light may be had in such a case by a comparison of income, expense and indebtedness. When all else fails, there is the memorized inventory, which, however, is never a satisfactory method, and all the adjuster can do in that case is to secure all possible information, carefully weigh all the facts and circumstances, and take such position as he feels to be fair and reasonable. These conditions, it should be said, are more frequently met in cases of lesser importance, although it cannot be said to be an unusual experience with respect to those involving fairly substantial amounts.

Having arrived at the quantity of merchandise on hand at the time of the fire and its value on the basis of the cost at the time it was acquired, the adjuster should next consider whether such cost price truly and fairly represents, under all the conditions surrounding the claim, a proper measure of value under the contract, and, if it does not, the cost basis should be increased or reduced accordingly.

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In considering the proper measure of value, it will be well to have in mind two features of the insurance contract, viz.:

1. It is a contract of indemnity and does not contemplate that the insured shall reap a profit as a result of the damage or destruction of his goods by fire.

2. It is a personal contract, insuring the person and not the goods.

As already stated, the policy by its terms (line one) does not cover beyond the actual cash value "and shall in no event exceed what it would then cost the insured to repair or replace with material of like kind and quality." Obviously the cost of replacement will vary with respect to the status of the insured. Is he the producer, manufacturer, importer, jobber, wholesaler, retailer or consumer? In the event of loss involving exactly the same kind of goods in the hands of each of the foregoing, a different price might be paid in each case and all be correct.

As to many classes of merchandise, particularly fibres, grain, foodstuffs, in fact, we may say, anything which is produced by the processes of nature rather than by manufacture, there is usually an established market value, and these quotations, as to the commodities described, are accepted in usual practice as the value under the insurance contract. The market value basis, it should be said, is by no means confined to the class of commodities just described, but by mandate of the Courts has been extended to include other classes of merchandise, the enumeration of which will not be undertaken here. The questions pertaining to market value constitute an important subject and cannot possibly be covered within the limits of this paper; suffice it to say that if the property involved be a commodity for which the insured is entitled to claim market value, that will be your basis, otherwise it should be valued at the cost when the property was acquired, plus appreciation to cover any increase in cost of replacement, or depreciation if the price has decreased. Depreciation must be considered, not only in respect to reduced cost of replacement, but from other angles as well. The policy (New York Standard) provides (line two) "with proper deduction for depreciation, however caused." This includes depreciation from changing styles, broken assortments, irregular sizes, shop wear and deterioration in any form, all of which should have the careful attention and review of the adjuster in arriving at "the actual cash value of the property at the time any loss or damage occurs."

The proper and actual value of goods which have been subject to fluctuation in price, as well as the matter of depreciation, are frequently questions for experts, and the careful adjuster will feel

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it advisable in many such cases to fortify himself with expert opinion and advice.

The Commission Clause, now included in practically all policies covering merchandise, is likely to give the adjuster (and the insured) something to think about from time to time. This is also a subject to be covered by a separate paper and it will not be referred to here, except to say that the original purpose of the Commission Clause was probably nothing more than to extend the policy to protect the insured against any loss which he might sustain by the damage or destruction of goods of others in his custody. In every such case the primary and controlling question was considered to be, whether at the time of the fire, the insured was actually liable to the owner of the goods. In recent years, however, as the result of various decisions by the Courts, the effect of the Commission Clause has been greatly extended, and at the present time, it may be said that the owner of the goods in the possession of another (in the absence of a special agreement to the contrary) has only to elect to avail himself of the insurance held by the custodian (if written with the Commission Clause), to be entitled to the benefit of any such insurance remaining unexhausted after the custodian has collected his own loss. The Courts have quite generally held that the owner may so elect after the fire, and one State (New York) has also held the owner may proceed in his own name directly against such insurance in case of the refusal or neglect of the insured to present such owner's claim.

We come now to the last stage of the adjustment, to wit.: the determination of the amount of the loss.

All losses fall into three classes, viz.:

1. Cases where all the property has been destroyed.
2. Where part only has been destroyed and the balance saved (generally in a more or less damaged condition).
3. Where nothing has been destroyed, but everything is in plain sight and subject to inventory.

As to Class One, the value and loss are the same. It is only as to Classes Two and Three that further steps are to be taken.

As has already been stated, the policy provides three methods for ascertainment of the amount of loss and damage. The first of these is by agreement between the insured and the company. The policy is very clear as to this. It first limits the liability of the company to not exceeding the actual cash value of the property at the time of the fire, and then provides (line one): "And the loss and

ADJUSTMENT OF STOCK LOSSES

damage shall be ascertained or estimated according to such actual cash value," followed (in line two) by these words: "Said ascertainment or estimate shall be made by the insured and this Company, or it if they differ, then by appraisers as hereinafter provided." It is the duty of both the insured and the Company to make every reasonable effort to reach an agreement as to the amount of the loss and damage.

The adjuster cannot hope to reach an agreement with the insured on any proper or satisfactory basis, unless and until he has himself arrived at a definite opinion. The first person, therefore, for the adjuster to convince is not the insured, but the adjuster himself. The greatest aid to the experienced adjuster in fixing damages on a stock of goods is a well balanced sense of proportion by which he is able, after arriving at the sound value, to estimate very accurately, by percentage, the amount of the damage. Study each case, taking into consideration the character and condition of the goods and their location with respect to fire, heat, smoke and water. Should the case involve unusual features, or the adjuster feel he is unable to arrive at a satisfactory conclusion as to the extent of the damage, he will do well to seek the advice and assistance of experts. Strive for consistency in your allowance of damages and endeavor to arrive at a fair, reasonable and well balanced statement of the loss, and in the average case, the greater part of your work is done. The adjuster, however, should not rely wholly and entirely upon the opinion of the expert. Experts, like doctors, are apt to disagree. Their advice while good and useful in matters of value, may not be so good as to the extent of the damage; in fact, in dealing with damage upon stocks of merchandise, the practical and experienced adjuster does not rely upon the judgment of third parties to the exclusion of his own opinion. The adjuster with a wide experience in determining the amount of damage upon merchandise is entitled to claim that he is an expert upon fire damage on all kinds of goods, and his opinion, therefore, is as good and probably better than that of the average expert.

The policy provides (lines eighty-six to ninety-one) for an appraisal "in the event of disagreement as to the amount of the loss." The adjuster will find it impracticable, if not impossible, to arrive at the amount of the loss and damage before fixing the sound value. The experienced adjuster does not attempt it. *Get your value first, then take up the loss and damage.* Either party, in the event of such disagreement, may demand the appraisal, and, when

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so demanded by the Company, it is a condition precedent to the right of recovery, unless waived. The policy does not require that the agreement for appraisal shall be reduced to writing, but it is usually so done. The conduct of the appraisal has been dealt with extensively elsewhere in the present course of lectures, and we shall content ourselves by stating here that the adjuster is entitled to be consulted and to consult with the appraisers, as well as with the umpire, if necessary, but only as to the conduct of the appraisal. They must be left to their own resources in the determination of sound value and loss and may approach the insured or the adjuster for information, but not for opinions.

And, as has been stated, the Company may exercise its option (line five of the New York Standard policy) and take all or any part of the damaged property at the ascertained or appraised value "on giving notice within thirty days after the receipt of the proof herein required of its intention so to do." Recourse to this method is usually for one or more of the following reasons, viz.:

- 1st—To prevent further loss, as in the case of perishable goods.
- 2nd—Inability to agree with the insured as to the amount of the loss, or to protect the Company from an excessive claim.

The customary course in cases falling under Paragraph One is to proceed by mutual agreement (and not by the formal exercise of the Company's option) to remove the goods from the fire premises for better protection, or to be conditioned, to be returned to the custody of the insured, or to be held to await the further order of the parties in interest, as may be arranged. The ownership of the goods remains in the insured and the rights of neither party have been changed or affected in any way. The purpose of the arrangement is simply to prevent further damage. The Company still retains the option to take the goods, or any part of them, at the ascertained or appraised value. If on account of market conditions, or to avoid further deterioration, or for other reasons, it is considered desirable that the goods be sold, the usual course is to proceed in the same way, i. e., by mutual agreement (not by the exercise of the Company's option), under an agreement that the goods are to be conditioned and sold "for account of the loss" or "for account of whom it may concern," the net proceeds to be turned over to the insured or held by the salvage operator, subject to the order of the parties in interest, as the conditions of each case may suggest or require. The experienced adjuster, however, does not consent to the sale of any salvage until the sound value of the same has been

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determined, and all agreements which he enters into, for the removal of goods from the fire premises for any purpose, are in writing, and invariably contain the words "subject to policy conditions," or equivalent phraseology. Good practice also suggests that, pending determination of the sound value and a full understanding of the facts bearing upon the claim, all arrangements looking to the handling or conditioning of the goods, or the sale of any salvage, should be by mutual agreement and subject to policy conditions.

Coming now to the class of cases referred to in Paragraph Two; the facilities and advice of the salvage operator is very often of the greatest assistance to the adjuster. The insured many times is unable to see the real value in salvage merchandise, but more often desires to be relieved of the trouble and annoyance of handling the damaged goods. In either case, his idea of the damage will probably be higher than the adjuster can concede. The Company has the right to an appraisal, but, if the damage is likely to increase, the usual course, in the average case, is to exercise the Company's option and take such of the stock as may be necessary or desirable, assuming, of course, that the sound value has been determined. It is hardly necessary, we take it, to remind the adjuster that an election to take any part of the stock will be an admission of liability, at least to the extent of the sound value of the goods so to be taken.

And now, a word for the adjuster himself. Someone has said he is born, not made. Nevertheless, I have a great admiration for the "home-made" article. He who in a large measure has in his make-up patience, tact and determination, is likely to succeed; other qualifications there are, valuable and useful, but, without these things, look for failure. Then there must be diligence, application and concentration, and he should be a man of peace, but ready to fight when the occasion demands. He must be honest and faithful in small things as in large, and he must never be careless. He must be fair to the insured and true to the interests of the insurers, and last, but not least, he should appreciate at all times that it is his duty to the insured, the Company and himself not only to know what the loss is, but to know why, and, knowing the right, to do it.

XXIII

ASCERTAINMENT OF VALUE AND PROFIT FROM BOOKS OF ACCOUNT

JAMES A. McKENNA, Certified Public Accountant

Without claiming any authority other than my personal opinion and impressions which are largely the reflection of practical experiences garnered during the long days of personal contact with the investigation of books of account which have fallen to my work-a-day life, may I still hope to command your attention, retain your interest and merit your approval.

The subject "Value and Profits as Ascertained from Books of Account" may embrace a wide range and diversified field in practical accounting, full of complex and interesting problems, the elucidation of which could not fail to prove highly interesting and instructive.

Value as shown by books of account is an expression of worth presumably recorded and ascertainable from actual transactions which, at the time of record, represented the worth of the articles dealt in and entered on the books of account with the ultimate object of showing the result of such transactions at a given time. The value deduced from books of account may be subject to increase or decrease caused by appreciation or depreciation, occurring subsequently to the entry of the worth of the commodity upon the books.

Profit as ascertained from books of account is the expression, in money value, of the excess of receipts from sales over the cost. This Profit is usually expressed in the form of a percentage upon sales, though it would appear to be more logical if the custom were to determine the profit percentage upon the cost.

The terms Value and Profit considered in their relation, one to the other, on the books of account, and ascertained therefrom, are so dependent on each other for their accuracy and expression of truth that perfect consistency must be scrupulously maintained at all times in the treatment of all factors which in a given set of books are employed for the ascertainment of both, for if one be incorrectly determined it necessarily follows that both are.

At the outset let us understand and keep in mind that even in kindred businesses there is no uniformity of system or practice in keeping books or in treating cost items. In fact there is great

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divergence of opinion as to what constitutes cost. So without any authoritative guide to refer to or quote from, I shall refrain from adding to an already much confused question by attempting to fix a standard and shall illustrate my point with reference to fundamental principles.

To find, from books of account, the value of a stock of merchandise, the usual and customary procedure is to follow the lines upon which the assured has kept his books, for in most instances the necessary segregations are observed and the claim for loss as prepared by the assured is based on and taken from such sources.

The factors which usually come under observation and call for the consideration of the person entrusted with the ascertainment of value and profits are: an inventory of stock on hand at a certain date, the purchases of material since then (as evidenced by invoices), freight and other necessary items of cost, to which, in case of a manufacturer, should be added labor and all necessary manufacturing expenses and legitimate overhead charges, carried down to date of fire. The aggregate of these items would represent the value of the stock at the time of the fire provided, of course, there had been no sales or shipments during the period covered by the account as prepared under these instructions and we would have to deal with a simple problem of addition. But there is almost always the question of sales and the reduction of the amount realized for the sale of goods to their cost value; or, when goods are sold at less than cost, a sum must be added thereto to equal their cost. This requires a determination of what amount of profit or advance over cost is contained in the sales amount and the ascertainment of the profit ratio on sales or, in rare instances, the ratio of loss.

Custom has to a very large extent established a practice which may be said to have much force in reason and justice to warrant its adoption, and that is to ascertain from the books of account what percentage of profit or advance over cost has been realized from sales of goods or of the product of the particular business under consideration. Custom has also prescribed certain rules as to how such percentage of profit or cost is ascertained and unless there is a very good reason to the contrary, these customs are followed for they are usually acceptable to both claimant and the insuring company.

In cases where there has been no previous period of business, namely, where a fire occurs before any inventory has been taken, it

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becomes more difficult to find a profit ratio to reduce the sales amount to a cost basis in order that a proper deduction may be made from the value of the stock represented by purchases or manufacture. Under such circumstances, in the case of a manufacturer the stock value may be ascertained by finding the individual cost for material, labor and overhead charges of the articles manufactured; then, from the books, should be ascertained the sums realized from the sales of such articles, or if not all, a sufficient number of such articles in order that a fair and equitable percentage of profit may be arrived at to reduce the aggregate output to a cost basis.

In the case of a merchant or jobber where the goods retain their identity in whole or in part an examination of the sales will show at once the price realized for the articles dealt in, and a percentage of profit can be easily obtained to apply to the sum realized in order to reduce the sum to a cost basis; or, if the business is of such a nature as to call for a more extended ascertainment of profit, the amount of profit or advance on each class of goods and on each style of goods can be ascertained, and by that method may be reached the value of the goods which have been shipped or removed from the premises where the fire occurred and upon which claim is predicated. To particularize any kind of business would be to extend the scope of this lecture beyond any possibility of intelligently and adequately covering it in the time which has been set apart for me to present to you my opinions on this subject.

Everything that I have called to your attention so far has been fundamental and by way of introduction. From actual practice most of you are entirely familiar with the matters of which I have spoken; indeed, where books of account are properly kept and a full and true record made of the items of original cost and all additions thereto, and of the amount realized from sales, it is a very simple proposition to deduce from the books of account both the profit and the value as shown by such books of account.

A word now as to Value. The economic side of value, the appreciation or depreciation which attaches to this value, the varying influences which might tend to increase or decrease the sum as ascertained from books of account, it is not my purpose to dwell upon nor to enter into here. Therefore, in considering the subject under discussion we will treat of the *value as entered upon the books, and the profits as ascertained from that value*, presuming, of course, that a correct and true record of all transactions is made in the books.

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The value and the profit deducible from books of account depend upon the verity of the entries made therein and it is to the elimination of any excessive or increased expression of value either through a misconception and misunderstanding of what constitutes value or a deliberate effort to increase such value that the accountant who is entrusted with the responsibility of the ascertainment of these two subjects has in actual practice frequently to address his attention.

Profit, in and of itself, is but the reflex of the other entries placed in the books, or the omission to enter in the books the transactions which should be of record. So that before any use may be made of a profit ratio deducible from entries in the books, where possible, the soundness of such entries should be tested; and where there is absence of the books, documents or records necessary for such verification, recourse should be had to other avenues of information which ought to lead into and form part of the bookkeeping system of the concern.

The field covered by bookkeeping is so large and comprehensive in its scope that to attempt to state what in his judgment and experience should represent value one would have to traverse such a variety of businesses and cite so many examples that it would not be within the range of possibility to cover them even in outline in the time allotted; and, to attempt to say what particular items go to constitute value and distinguish them by name would necessitate qualifying explanations because of the differences between the methods of running the accounting departments of mercantile, manufacturing and other establishments. As to the original cost of materials, labor, freight and other incoming charges we find substantial agreement, but there consistency ends. One concern in perfect honesty will contend for one class of expenditure as overhead charge, while another concern equally honest and experienced in the conduct of its business will disregard such an expenditure in the overhead charge.

To take up seriatim and discuss the relative methods of each of these contending parties would lead us into a maze of the niceties of bookkeeping and accounting. Furthermore, it is assumed that it is within the knowledge and experience of most of you—I might say the daily experience of many of you in the discharge of your official duties—to be called upon to ascertain from books of account a statement of value and profits. In such cases it is the

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face value of the figures therein entered with which you deal and this daily experience has practically reduced such ascertainment to a sum in arithmetic, neither complex nor difficult.

Although avoiding dry theories, I shall not leave this part of my subject without giving you two actual instances of obtaining value from books, first, by reducing the elements in the books to cost and, second, by ascertaining the value on the books by the employment of a profit ratio.

The first instance is the ascertainment of the value of a stock of goods from the books which were kept on a cost basis, as follows:

Inventory on hand.....	\$143,813.36
Add manufactured since, at lot book cost.....	266,642.21
Making total stock of.....	\$410,455.57
From which deduct sales at lot book cost of.....	167,894.14
Leaving on hand manufactured stock at lot book cost of.....	\$242,561.43
There was salvaged at lot book cost.....	101,511.69
Leaving totally destroyed at lot book cost.....	\$141,049.74
Which, reduced by deducting manufacturer's profit of.....	10,448.13

(a ratio of 108:100)	
Shows the manufacturer's cost of stock to be.....	\$130,601.61
which includes certain excessive overhead charges.	

Possibly no better illustration of the divergence of opinion as to what constitutes overhead or fixed charges can be cited than this particular case. The assured was of unquestioned integrity, of the highest moral and business reputation and one of the most efficient manufacturers in the country, yet carried on the books and charged as part of the manufacturing cost certain fixed charges which it was contended most strenuously were proper elements of cost and value. After many conferences and protracted discussions and presentation of arguments and figures pro and con in which I was privileged to join as accountant representing some seven or eight adjusters who appeared for the insurance companies, carrying a line of over \$200,000 upon the stock, it was agreed that the overhead charges were excessive by four per cent., and a sum of \$5,023.14 was deducted therefrom, leaving a book value of cost of \$125,578.47. It was determined by calculation that 71% of this amount represented raw material which was charged upon the books at its invoice cost value which was used as a basis of cost in all the calculations heretofore referred to and employed in this statement. Nevertheless, this 71% was subject to a cash discount of 9%; therefore, it became necessary in order to arrive at

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what we will here call the cash value at the time of the fire, to reduce the 71% (or \$89,160.71) by 9% (equalling a sum of \$8,024.46). By applying this deduction of cash discount of \$8,024.46 from the book value of \$125,578.47 we have a remaining value of \$117,554.01, which it was agreed and determined represented the cash value of the stock destroyed by the fire.

It is rarely that we find a case in actual practice which includes so many of the elements which are necessary to reduce a stock of merchandise to value. In this case we had to deal with the manufacturer's profit, with an excess of fixed or overhead charges and with a cash discount; all of which had to be determined upon a percentage basis as shown by transactions on the books for periods of actual operation at a time preceding the claim. That they were ascertained correctly is evidenced by the fact that they were accepted by both the assured and the representatives of the insurance companies who, after exhaustive analysis of the books and detailed calculations, reached the same conclusion.

The first value which we reached in this case was what was called the lot book cost and it amounted to \$141,049.74. When a net cash value of \$117,554.01 had been fixed upon as the measure of the worth of the goods destroyed in the fire we had reduced the lot book value or cost by \$23,495.73. In this case the books afforded ample information to work out to a demonstration the very satisfactory results here shown and the assured met us with a disposition of willingness to be convinced by the arguments that we were able to present. I may add that this happy condition of affairs is not always present in examinations of books of account and adjustments and settlements of losses.

My second example is an ascertainment of value by the employment of the profit ratio and has to do, like the preceding case, with a loss which was actually settled and determined happily and, like its forerunner, satisfactorily to all concerned.

The stock on hand at the time of inventory taking amounted to	\$707,715.46
To which we add the purchases less errors and omissions and duplications of.....	1,484,657.42
From which a deduction should be made for rebates and bonuses (which was peculiar to this particular business) of	14,630.97
Adding the inventory and the purchases together and deducting bonuses and rebates, we have a total stock of....	2,177,741.91
There had been sales and shipments of goods which, according to the books, represented the sales value of.....	994,192.11

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From the books of account, in this instance from the operations of the preceding years, it was found that the profit ratio varied very little in the various years; therefore, accepting the showing from the books of account it was determined and agreed that the percentage of 14.21% flat on sales was included in the sales values of \$994,192.11. Thus it was necessary to reduce the sales value to a cost or book value by a deduction of 14.21%, which amounted to \$141,274.70, from the amount of the sales. This deduction placed the sales at a value of \$852,917.41 and upon an equal basis with the cost as charged upon the books. The next step in the ascertainment of value was to deduct this \$852,917.41 from \$2,177,741.91, the total of Inventory and Purchases, leaving \$1,324,824.50 as the book value of the stock at date of fire; but at the time claim was made for loss by fire there were at sundry other places beyond the cover of the policies concerned goods of the book value of \$230,101.17 which also were to be deducted, leaving in the premises where the fire occurred goods with a book value of \$1,094,723.33. The purchases made by this concern and charged upon the books at invoice cost were subject to varying rates of discount, some as low as 2%, others ranging, with allowance for dating, considerably over 9%. The operations of the business for the preceding years showed an average available cash discount of something under 7% while much of the stock that was purchased and consumed in the fire was entitled to an average discount of something over 7%. It was finally agreed that a deduction of 7% from the book value was fair to all concerned in order to reduce the stock consumed to a cash basis. Therefore, the sum of \$76,630.63 was deducted from the book value aforesaid, leaving as a cash value of the stock on hand at the time of the fire \$1,018,092.70.

The citation of these two instances is quite sufficient to illustrate the practicability of preparing a statement from the books of account. It is very evident that the ascertainment of the factors employed called for an extensive examination, particularly in determining the profit ratio, but in every branch of the work we could depend absolutely upon the honesty of the figures of inventory, sales, purchases and other elements entering into the problem. Barring clerical mistakes we could accept without question the entries upon the books.

Had we encountered in these two instances elements of fraud as to inventory, excessive charge for purchases or omission of sales, we would have had a more serious if not a practically impossible

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problem. We could have deduced certain figures from the books, however, which might have fallen under and comprehended one definition of value and profits as ascertained from books of account but which would not have represented the correct value of the property intended to be represented and purporting to be so represented.

It has happened, not infrequently—and one has not to be a prophet to say it may happen in the future—that the inventory by which the merchandise or trading or manufacturing account on books of account is closed is swollen as to values of the articles therein mentioned and, also that the numbers of articles therein mentioned are set down at more than were actually on hand at the time the inventory purports to have been taken. In other words, the inventory may be loaded as to quantity, as to price, or both. When this is the case we have not only a surcharge in the inventory of whatever the amount of loading may be determined to be but we have an increase in the profits which is reflected in an increased profit ratio. Now, when we apply this increased profit ratio to the transactions for the period from the taking of the inventory to the date of the fire we take from the sales more than the actual profit realized, and by such method reduce them below cost which, as is readily seen, tends to inflate the value of the stock in the premises at the time of the fire.

The many and varied methods employed to load an inventory make it extremely difficult to prove that a certain class of goods or certain items set out in detail in an inventory are in excess of what they ought to be. And while experience in the examination of books equips a man very often to go to the place where such falsification exists, still from such experience one becomes thoroughly conscious that the more we know about such transactions the more we know that we do not know. I have often heard it claimed that locating the loading in an inventory is a science known to few—and I have heard science defined as “first experience, then inference.”

That entries in books are not always to be taken at their face value experience has again and again proved; and in fact, we are not without absolute proof that a fraudulent amount claiming to represent inventory of stock has been deliberately and purposely carried upon books as true and correct and statements drawn therefrom based upon that fraudulent amount for a period exceeding FIVE YEARS. As bearing directly upon this kind of fraudulent expression of value permit me to cite two instances which have come under my observation and which fell to my lot to develop in

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the course of investigations I was conducting in behalf of the insurance companies where claims had been made for loss suffered by fire.

After the happening of a fire where considerable damage was claimed to have been done to a stock of goods and a claim presented in excess of the proper amount by over \$100,000, effort was made to sustain such claim by the entry of a swollen inventory, the merchandise account on the ledger being increased by the aforesaid sum of \$100,000, and a corresponding increase being made in the capital account. Six years prior to the inventory preceding the fire the inventory, profit and capital accounts were increased \$100,000 and this increase in the inventory and capital account was carried down through all the years to the time of the fire. Examining the merchandise account and running back for a period of two, three or four years would have found the inventories in perfect consistency and no disturbance made in the percentage of profit. The capital account had likewise preserved its consistency, no disturbance being found there. But the amount of the claim seemed exorbitant and put the Committee of Adjusters in charge upon inquiry as to why such an extraordinary amount of stock should have been carried for the amount of business that was being done and an *exhaustive* examination of the assured's books was authorized. Running back of the three year limit in such investigation it developed that it had been the custom of the concern to allow interest upon the *net capital* employed in the business, and it was then discovered that the interest allowance had been made upon \$100,000 *less than the amount carried upon the ledger*. With this lead the examination ran back to the six year period where the alteration was discovered to have been started and in the particular year at the close of which the \$100,000 increase was made in the inventory, the profit shown by the books was \$100,000 in excess of the division represented by a journal entry as having been made to certain junior partners. The alterations of footings of the merchandise and capital accounts were very skillfully executed, the ink used having been exposed to the air to age it and where it was necessary to remove a figure such removal was made by acids and was so skillfully done that the ruling in the book was hardly affected. In very many cases it was not necessary to remove any figures at all, it sufficing simply to prefix the figure "1". Having established the *fact* of the alteration we were soon able to secure abundance of *confirmation*.

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In another instance where the inventory was increased by \$100,000, and carried on the books at such fraudulent figure, statements were regularly made to mercantile agencies for a period of over five years, representing inventory of stock on hand as being over \$100,000 in excess of the true amount; a total destruction of the property took place and there was presented to the insurance companies a detailed inventory fraudulently increased by over \$100,000. The inventory (in crude, though regular form) was properly entered on the books. For five years immediately preceding the time of the fire the inventory entries created no unusual disturbance in the merchandise, profit or capital accounts, but at the same time carried fraudulent loading of something over \$100,000. In this instance it so happened that the ledger presented for examination covered a period of two years prior to the fraudulent increase and while the normal profit ratio of the business showed about 25%, the period wherein the fraudulent inventory was entered showed a profit ratio of over 170%. Had the assured offered in support of his claim a ledger covering but four years' transactions we would have been confronted with an inventory amount entirely consistent upon the books for a period of four years and supported by a detailed inventory purporting to represent the actual count and record of the stock on hand at the date of inventory taken next preceding the date of the fire, but actually containing a loading of over \$100,000.

From these two instances it is evident that figures on books of account do not always represent the value of the goods and stock on hand at any given period. And, indeed, one cannot help but wonder who it is that "cooks up" the extraordinary travesties which one comes across from time to time in the examination of books relating to claims for loss by fire.

Quite another source of improper statement of values from books of account occurs where there is incorporated into the charge for material or labor improper amounts—in the case of material, through false invoices, and in the case of labor, either through padded payroll or a faulty conception of what constitutes cost. Very often we find elements under the heading of overhead charges which are clearly and distinctly items of expense, to be borne and paid out of the profits of the business and in no way chargeable to the cost.

As to the first of these classes of improper charges (that of invoices) we find great difficulty at times in recognizing and distin-

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guishing that which is false from that which is true. Here it is that the *experienced man*, either adjuster or accountant, must be relied upon to detect the fraud.

The elements of the *padded payroll* also require experience and analytical ability to discern the lack of proportion by which such improper charges are exposed. The inclusion of excessive amounts for overhead charges is a matter open to dispute and discussion and they can hardly be classed as positively fraudulent items although their effect in increasing the amount of a claim is as potent. To determine just what are proper overhead charges is to treat of a variable factor, according to the particular business under investigation.

Another class of error or fraud which we find (though not frequently) is the *suppression of sales*. The ascertainment of the amount of sales suppressed presents real difficulties. Sometimes they are suppressed by actual sales directly recorded on the books and an entry made falsely purporting to show returns of the goods to the seller. I have come across this class of fraud several times in the past few years. The shipments of large quantities of goods with no record or only a partial record being made upon the books, is certainly difficult to trace and is too varied a subject for any but the experienced specialist.

I know of an instance where the following method was pursued: a sale amounting to \$1,000 was made to A and recorded on the salesbook as \$100, A's account in the sales ledger being debited \$100. When A paid this bill, sending a check for \$1,000, it was not entered in the regular cash book of the concern nor was deposit made in the seller's bank; instead, the check was deposited to the credit of the bank account of a member of the firm and he drew his personal check for \$100, which sum was entered upon the books of the firm as the amount received from A. This method effectually shut out any reference in the books to the sum of \$1,000. There were a number of such transactions. In carrying out this scheme of suppression of sales and false entries upon the books there had to be collusion between the bookkeeper and entry clerk (in this case one and the same person) and a member of the firm. Discovery of the fraud was made by the fact that a certain style of goods which was shipped to A was shown by the manufacturing book to have been in stock, but some time prior to the fire an *order sent in by X* for a quantity of this style number *was declined with regret because the entire quantity had been sold to A* who,

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no doubt, would be pleased to fill X's order. Acting on this clue an investigation was started which developed the fact of the suppression of the \$900 sale to A and of sales to other persons approximating in all over \$10,000, all of which had been paid for and cleared, as stated, through the private bank account of a member of the firm.

Thus far we have been speaking of cases where we have had complete or nearly complete sets of books. It not infrequently happens in cases where reasonable suspicion is aroused by the amount of the claim compared with the extent of the fire that certain books and records are missing. Indeed, this condition has grown so notorious that it has become the custom to look for and expect that in a certain character of claims the books most needed will not be produced. We then have a different problem to face and often are forced to go outside of the record as presented. Oftener, however, we can by laborious and painstaking analysis gather from the remnants of imperfect records which are available sufficient evidence logically and completely to refute and disprove the amount of value claimed. In the employment of this kind of investigation the profit ratio enters very largely into the work and oftentimes becomes a determining factor. Sometimes, however, the work of manipulation has been so adroitly and successfully carried out as to deprive even these analytical methods of their potency and force. In cases of such nature the ascertainment of value becomes more difficult and the calculations more complex. There are, however, in every business certain rules and averages governing and controlling the relation of one account to the other, any disturbance of which necessarily is reflected in one or the other. In such cases it becomes the duty of the accountant to analyze the material obtainable by him and to marshal his facts, however meagre, to develop the fraud, so as to show negatively, if not affirmatively, that the amount and value of the loss could not have been as represented, even though it may not be within his province to state correctly what it OUGHT to be.

In testing the accuracy or reliability of the entries on books, as regards the inventory, the items of purchases, sales and other factors of value and profit, the use of the accepted canons of the art of accounting very frequently discloses that there is a lack of harmony in these factors which increases the value, such increase being included by the assured in the statement of the claim presented for payment. This disturbance is based upon the fundamental truth and logic of accounting which often points the way for the correction of the error.

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While books of account speak authoritatively and are relied on almost wholly for the evidence of the claims of value and profits presented, nevertheless the personal element of both the investigated and the investigator, or the claimant and the adjuster and accountant, have largely to do with the successful outcome of all examinations. An attitude of know-all and self assertiveness while *always impeding*, more often than not will *absolutely thwart* the investigator in his purpose of ascertaining all the facts surrounding and concerning the claim and in seeking the truth beyond the figures. Bearing in mind that the claimant having met with a misfortune by fire is entitled to and should receive courteous consideration and expeditious treatment in the examination of his claim, it holds true that a proper consideration of the claims of the assured and those of the insurer will best subserve the interests of both.

In cases where we have reason to believe that an improper claim is being made and we are searching for the facts groping about without definite guide, it is well to bear in mind the old adage that the blustering North wind was defeated in its efforts to tear away the traveler's coat but the cheerful whisper of the South wind out of a smiling sky won the victory.

Concerning the actual work of investigation of books for the purpose of eliminating fraud which has been planted therein, it may be said that while to the uninitiated the labor may appear to be trying and unpromising still, to those who pursue the work with the creative imagination necessary to draw from the entries and read beneath the figures the suggestion and clue leading to the unraveling of the skein of fraud showing wherein they are contrary to the truth and misrepresent the facts that should have appeared, it is a real pleasure and a test of the gold of experience that is on deposit in the mental treasury of the investigator.

To lay bare the artificial means employed to create value and swell profits, and to take away all such inflation with its attendant malpractice, thereby restoring the proper condition is a labor which, far from tiring, holds till the end the concentrated energy of the investigator whose reward is ample and satisfying when he has separated the false from the true.

XXIV

ADJUSTMENT OF AUTOMOBILE LOSSES

E. B. HOPWOOD

The adjustment of an automobile claim begins with a proper identification of the car on which loss is claimed, by motor number and serial number, the motor number being found on the motor, the serial number generally on a plate attached to the dash board. You will find policies reading "car or motor number,"—both can be used to advantage, the reason being that frequently the motor number is the car number of a year earlier or later. There is often a casting or body number used, neither having any relation to the car number. The year and model are next determined, and we ask to examine the bill of sale.

Two forms of policy are in general use by the Fire Companies—the valued policy and the non-valued policy, the valued form of policy reads: "The said automobile hereby insured (body, machinery and equipment) is by agreement of this Company and the assured, valued at the sum hereby insured." The valued policy covers full indemnity for fire jointly with theft, the theft clause differing (a) the Company paying only in excess of \$25; (b) the Company paying when loss is over and including the \$25; (c) full coverage; (d) in consideration of additional premium paid for additional indemnity to cover equipment in, and on the car when originally purchased. At the present time, there is a question arising as to whether the valued policy means that the value of the car is the same when injured as when insured, or that the valued clause is destroyed by the appraisal clause. The non-valued policy excludes theft, and is the same as the valued form, leaving the value and damage to be determined at the time of the claim.

The collision clause is attached, to indemnify the owner for damage by collision to his car. There are two forms of this clause in general use—the full coverage, and the deductible, the latter requiring the assured to stand the first \$25 of the loss; but not to include loss of time.

The property damage clause is a similar rider or endorsement to cover damage done to property of others, with a limit of liability and excluding human lives.

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FIRE LOSS: All cars are constructed of wood, metal, leather and paint, or substitutes. Estimates for repairs are easily secured. The most satisfactory is a joint survey of the damage with the manufacturer of the car or his accredited representative. The better grade of such men are willing to build up an honest estimate and little, if any, unnecessary repairs or overhauling is included. It is not unusual for an owner or his chauffeur to see that the entire car is "shot to pieces." The most unjust and unfair estimates come from the *always competent and disinterested* repair shop proprietor, who has been asked to give what he thinks is a low estimate to properly do the work. This kind of shop is made possible only by graft. Go to the repair shop with a door in front. No better treatment can be asked for, than is given by the several service stations of the leading automobile companies of this city, and all repair jobs for Insurance Companies are rendered to the owner with two bills, one marked "accident," the other "upkeep."

The causes of fire are not numerous: crossed wires, overheated motor, leak in gas line, smoking—and, when no other cause can be assigned, what is generally termed "back-fire."

In collision, the amount of damage sustained is arrived at in the same manner as in fire losses, but is more satisfactory. The work of preparing the claim is entirely different. For simplicity imagine that you have an accident to investigate, occurring at 72nd Street and Columbus Avenue, New York; the car insured going south on Columbus Avenue, the offending car going west on 72nd Street; we make a diagram very carefully by scale of the streets, car tracks, elevated railroad posts, lamp posts on the corner, the fire hydrant nearby. We find the exact point of contact, located by a store window, the stoop of a dwelling, or some object easily remembered as to location; do away with "about so many feet" and take exactly by inches the distance from the curb to the point of collision, where it was struck, where it was stopped, whether right or left hand drive cars; whether one or two were on front seat, whether side curtains were up or down, and whether the other car could be seen from a position on the side street, if so, how far; which car blew the horn first, when and where and how many times. Put everything clearly on paper, then arrive at the damage. A good adjuster settles his claims out of court. Be reasonable, just and fair. You ought to be able to close all claims in an amicable manner.

If you intend recovering, notify the owner of the offending car that he may examine your car; be explicit as to where and when;

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interview and be careful of witnesses; better one witness who can answer well, than too many who know little. Be sure that the car you insure was driven by a licensed chauffeur, and his trip was authorized; ascertain whether the offending car was driven by owner or his licensed representative, where going, and whether properly at the point where the accident occurred.

Counsel for the defendant will claim your repairs were extravagantly made, or unnecessary work done. In fact, that you were "over generous," or have "been robbed," that his man could have repaired for less, say one-half. Remember that he, or those whom he represents, do not insure the car, and he is not figuring from a point of indemnity. His point of view is to defeat you entirely, if possible; if not, to pay as little as possible. He might be generous enough to offer you one-third or one-half, to settle, with the statement that he is over-paying you. No matter what you do, it is wrong; no matter how little you pay, it is too much.

Your own lawyer, of course, is to help you, but he is apt to find that you have neglected this or that and that he would have done something else. Every lawyer has his own way of preparing a case, and if you intend consulting a lawyer in the end, why not consult him first? Then, if he wins, it will not be altogether by his magic, and if he loses, it will not be all your fault. Adjusting is one trade, but an adjuster is not a lawyer. Infrequently, you are allowed to sue in the assured's name, but more often it will be done under subrogation. At all times, I recommend suit under subrogation. The opposing counsel will not ask for quite so many adjournments and is not so anxious to tire you out.

PROPERTY DAMAGE: This is a most exasperating class of work. The claimant always knows that he was going eight miles an hour, he is equally positive that your assured's car was going fifty miles; he will dispute everything that your assured says, especially immediately after the accident. The second or third day after, he will generally cool off, and some reasonable conclusion can be reached as to how the accident happened, and the actual damage. It is necessary to examine the two automobiles in these claims—the one insured to ascertain whether it is properly insured, and that of the claimant, as to damage, etc. In case of an accident with a horse, use a veterinary; with a carriage, a carriage builder; if with a house, use a carpenter; or, if with a fence, an iron worker. It is not well to judge alone as to the amount of damage sustained. If the case is taken to court, it is absolutely necessary to have men qualified to

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testify in the line of business which the damage involves; the courts always require the witness to first qualify as competent to testify. It is extremely easy for claimants to produce inflated estimates and have the artisan take the stand to back them up. After your first case, you will have lost much faith in human nature.

AS TO THEFT LOSSES: Replacing accessories is simple. The owner can generally show some bill or some evidence of the property stolen, but in no event will one ever find anything stolen that has been used; it is always new.

When an entire automobile has been stolen, experience has taught me that it pays to advertise its loss in newspapers and to send out descriptive postal cards and circulars. When theft of cars commenced years ago it was thought expedient to offer rewards for the return of the car, with an additional amount for the apprehension of the thief. We found that the reward system had outlived its usefulness and was encouraging thefts; we were told that it would be unsafe to further advertise for the arrest and conviction of a thief, because a man might be arrested and convicted, the reward paid, then it might be found on appeal that the conviction was improper. The thief might have an action against the Insurance Company on the theory that the reward was paid for persecution and not prosecution.

The form of advertisement is as follows:

AUTOMOBILE STOLEN.

National racer, 1914, motor, New Jersey license No. 501M; stolen between 4:00 and 5:30 P. M., May 26, from northwest corner 56th Street and Broadway, New York, Michelin shoes rear, Goodrich Safety front, two extra on back, painted Yale blue, striped white; property of ——— Perth Amboy, N. J. Communicate with ———, — John Street, New York. Tel., ——— John.

The court decisions have often been unfavorable to Insurance Companies. In one case it was proven that the number used on the car insured had never been used by the manufacturer on any car, the trial and appellate courts both holding that as we did not prove that that number was not on the car and that the car insured was not stolen, the Company should pay. In another case the numbers were changed, making the car a 1909 instead of a 1908; we had such a good case that it was tried before the court, without a jury, but the court decided that that was the only car the man owned and the only car insured, and therefore it must be the car stolen, giving judgment for the plaintiff. The following case was decided in favor of the Company. The year was improperly given, and the court held that

ADJUSTMENT OF AUTOMOBILE LOSSES

the Exchange and Warehouse rules. It is very different in the the policy, which was the valued form, was based on representations of the owner of the car, and if the automobile was a year older than represented, it was not worth the amount insured, and had the Company known the correct year, they would not have issued a policy for the amount. Held by the Court, to be a material misrepresentation, and the Company won.

A very aggravating case was disposed of by the Union County, N. J., court. The policy reads: "it (the automobile) shall not be used for carrying passengers for compensation and that it shall not be rented or leased." A dealer insured a demonstrating truck; when he needed money, he demonstrated his truck by carrying merchandise from one point to another, for which he charged. The court held that the car was always under his control, that he did not carry passenger for compensation, that the word "leased" applied to real estate and was not properly used in the contract, that the car was not rented because it did not pass from the owner's control, that he gave instructions to his chauffeur. After consulting a dictionary and following the various decisions relative to leasing or renting we must agree with the finding.

I am concluding with this statement: I do not believe that underwriters fully appreciate the increasing difficulty of recovering stolen cars, more particularly the expensive ones.

The District Attorney of this city is alive to the situation. A squad of detectives is detailed to do nothing but work connected with stolen cars in Manhattan and the Bronx, frequently assisted by other precinct detectives where a theft occurs. But the police or private detective agencies cannot keep up with the thieves.

A thief is not smart, bright or intelligent, the same amount of brains used in any line of business would be a failure. Thieves are creatures of chance, and carelessness is their opportunity.

The answer to the problem is forced prevention, the simplest and most effective means being a law preventing registration of any car by a number other than that given by the manufacturer. This would cut off the traffic in stolen cars. Of material assistance would be a law, made and enforced, prohibiting the offering of rewards for stolen property and making it impossible for rewards to be paid "on the quiet."

XXV.

ADJUSTMENT OF COTTON LOSSES AND COTTON SALVAGE HANDLING

JOSEPH J. WINDLE

When I accepted the Committee's invitation to deliver this lecture, I was informed they wished me to cover the whole field. This requires a reference to all the different policies and forms under which cotton is insured, an analysis of the various bills of lading, clearances, freight expense bills, and other railroad documents, under which cotton is moved, and the rules of the various weighing and inspection bureaus and cotton exchanges covering the "delivery" of cotton from seller to carrier or buyer. As I will explain later, with the exception of Long Staple and Sea Island cotton, ascertaining the value and loss is an easy task for the experienced adjuster. The complications and difficulties arise in ascertaining the quantity of cotton on hand and determining the question of what we may call ultimate liability between the carrier, warehouseman, buyer and seller, and the various insurers whose covers often overlap. We not only find different rules in adjacent territory, but even in the same town, and at the same compress each railroad may have different rules governing the acceptance or delivery of shipments. Reference to all these documents is necessary to give such a paper any educational value, but I have made my references to the various documents as few and short as possible, and have attached copies of the forms in general use except those which some interests do not wish me to publish.

In adjusting cotton losses in the primary markets of the South, we encounter many complications and difficulties which you do not meet in similar losses in the Northern field, for here the cotton is bought and sold in large lots of usually fifty bales or over. Before it reaches this port, it has been classed, graded and valued, and after it lands here it is again classed and valued by competent men. Nor is there any difficulty in determining the quantity in any given warehouse. Northern people realize that a bale of cotton is a valuable unit, handle it accordingly, and the adjuster can usually obtain all records concerning it. There is no question here as to what constitutes delivery from seller to buyer, nor much difficulty in determining who owns the cotton and under whose policy it was covered at the time of the loss, all such matters being settled by

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the Exchange and Warehouse rules. It is very different in the South, where with the exception of the large ports, such as New Orleans, Savannah, Galveston and some inland terminal points like Memphis, Tennessee, Dallas, etc., there are no Exchange or other recognized rules governing the delivery of cotton; therefore local customs and usages, differing in the various places, have to be considered in determining the question of ownership and liability. The receipts issued by the majority of compresses and warehouses call for delivery to bearer, and do not require any endorsement. Cotton is good collateral upon which the banks loan most liberally. Where a buyer has any established credit with his bank, it is not unusual for such bank to allow him to make drafts on it for all the cotton he buys, attaching the warehouse receipts or bills of lading thereto as collateral. The bank pays these drafts on presentation and charges them to his account where they are carried, really as overdrafts, although for the sake of appearances and apparent compliance with the banking laws, they may call it by some other name. In many of these banks we find the same loose business methods that are almost universal in the Southern cotton business. Some warehousemen are so careless that they do not always require the surrender of their warehouse receipts when delivering cotton in their custody to people they know, hence the fact that the assured produces receipts covering so many bales of cotton in the burned warehouse is far from conclusive evidence that he had that much cotton there.

From the time the American cotton crop is picked off the plant to the time it reaches the mills, it seems to be abused by every one who handles it. In my sea-faring days when I used to come in contact with American, Egyptian and Indian cotton in various countries, we could spot an American bale almost as far as we could see it, as it was always distinguished from its Egyptian and Indian cousins by its ragged, torn and generally disreputable appearance. In those days the American cotton bale was a glaring contrast to the American clipper ships which we then found in so many ports, admired by all and conceded, even by the conceited British seaman of that day, to be the trimmest and most beautiful craft that ever sailed the seas. The American cotton bale is still with us, a typical example of the careless and wasteful methods of the American cotton business.

Few people who are not connected with some branch of the cotton industry appreciate the magnitude and importance of the

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business or its controlling influence in the development of this country. In 1790 there were 697,897 slaves in the United States (of which 21,324 were in New York State); in 1860 there were 3,953,760 in the country. This increase was entirely due to the development of cotton planting in the Southern states. As early as 1790 slaves were becoming an expensive burden to their owners, for, except as personal servants, their labor could only be profitably employed in raising rice, tobacco and cotton. The cotton crop was not then a very important one, and the best "field-hands" brought only \$200 each in the slave markets. It is probable that this economic pressure would in twenty or thirty years time have settled the slave question with little or no controversy, but this pressure was reversed by the inventions of Kay and Cartwright perfecting the loom, Arkwright and Hargraves the spinning frame and mule, and Watt the steam engine. These created a demand for cotton which could not be supplied by the slow methods of ginning by hand, or the old roller process, but was met by Whitney's invention of the cotton gin in 1793, from which date the wonderful development of cotton into a world power really begins.

In 1790 the United States produced 3,138 bales. In 1914 the world's cotton crop was approximately twenty-nine million bales, of which the United States produced fourteen and a half million; the balance of America two million; India five million; China four million; Egypt and Russia a million and a quarter each; and all other countries approximately a million and a half.

The United States exports from eight to ten million bales of cotton per annum, worth approximately five hundred million dollars in its raw state on the American seaboard, being more than 25 percent of our total exports and exceeding the combined value of the three next important products, namely: Iron and steel manufactures, meat and dairy products, and food stuffs. The value of raw cotton exports usually exceeds the balance of trade in favor of the United States, thus a failure of the crop or serious reduction in exports would immediately turn the balance of trade against us. As far as the insurance interests are concerned, cotton is undoubtedly the greatest premium producer of any single commodity or industry.

HISTORY OF THE COTTON CROP AND ITS CULTIVATION.

When we are considering this commodity, it is well to have some knowledge of it beyond the fact that it is a vegetable fibre, spun into yarn and used principally for making cloth.

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The use of cotton in the Liberal Arts seems to have originated in India where it was undoubtedly grown, spun and woven in pre-historic times, thousands of years before the Christian Era. It is mentioned first in the Rig Veda, a Hindu Hymn, supposedly written about 1500 B. C.¹ In 800 B. C., the religious law, as given in the Sacred Institutes of Manu, prescribed heavy penalties for thefts of cotton. Herodotus wrote some time about 440 B. C. that the Hindus "possess a kind of plant which—instead of fruit—produces wool of a finer and better quality than that of a sheep, and of this the Indians make their clothes." Cotton is not mentioned in the Bible, though there are many references to spinning, weaving, and dyeing linen and wool. Some writers claim it was not used by the ancient Egyptians as the mummy wrappings and other cloths found in the ancient tombs are made of linen, that is, flax and not cotton, but these men were bold sailors and explorers, and it seems very probable they had seen and traded in cotton during their many Eastern voyages.

There is no doubt the use of cotton for making cloth was known on the American continent long before Columbus first visited its shores, for it is recorded that when during his first voyage in 1492, he landed on the Bahamas, the natives came out to his ships in canoes, bringing with them cotton yarn and cloth for the purpose of barter, and later, on landing in Cuba, he was surprised to find cotton canvas and cord in general use. During Magellan's first circumnavigation of the globe in 1519, he found the Brazilians using cotton cloths. Cortez, on his expedition through Mexico in 1519, found cotton in general use there and was so pleased with the quality and beauty of the Mexican cotton goods that he sent his emperor, Charles V., a present of some cotton mantles and cloaks.

When Pizarro conquered Peru in 1522, he found the natives growing and manufacturing cotton in large quantities.

The first mention of its cultivation in the territory which subsequently became the United States of America, is found in "A Declaration of the State of Virginia," published in London in 1620, where, in a list of articles "To be had in the Virginia Colony," we found "cotton wool 8d. per pound." But it was probably first cultivated, to any considerable extent, on the Cape Fear River in Carolina by some colonists from Barbadoes who settled there in 1664, bringing their cotton seed with them.

¹The Culture and Commerce of Cotton in India, by L. F. Royle. London, 1851.

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There are writers, some of whom are entitled to great respect, who maintain cotton was originally indigenous to India, from which country it was carried and planted in Persia, Greece, Egypt, South Africa, Spain and North and South America, but if we credit the reports of Columbus, Magellan, Cortez and Pizarro, we must hold it was also indigenous to the American continents and islands, or admit some earlier voyages of Eastern explorers than those recorded by Columbus and his followers.

We know it quickly responds to changes of climate, soil, fertilizers and methods of cultivation, so that seed brought from one country or district to another often assumes the characteristics of another species. The cotton plant, the botanical name of which is the *Gossypium*, reproduces itself from its own single seeds, which grow in a pod or "boll," in some varieties as many as thirty-six growing in a single boll, and to which seeds the cotton lint is attached, as your hair is, or with some of you I should say was, attached to your heads.

In some districts, among which are parts of India, Peru and Porto Rico, the cotton plant grows as a shrubby perennial, making a tree from ten to twenty feet high, with a trunk from five inches to eight inches in diameter, but when cultivated commercially it is generally grown as an annual, making a shrub from two to six feet high.

CULTIVATION AND HANDLING UNDER PRESENT CONDITIONS IN U. S.

The seed is planted in the spring, usually in drilled rows, with from $2\frac{1}{2}$ to 5 feet spaces between rows, the plants being hoed or chopped out when they reach a suitable size, leaving single plants spaced from 8 to 36 inches apart, according to the district, richness of the soil, etc. After this, in order to keep the ground free from weeds and retain the moisture, it is cultivated at short intervals until some thirty days before the crop is ready for picking.

The periods of growth average as follows—from time of planting to first appearance above ground, 15 days; to first bud, 40 days; first blooms, 65 days; first open bolls, 136 days. The average yield is slowly increasing, but I doubt if it exceeds 225 pounds of lint cotton per cultivated acre.

Picking. There have been many attempts made to perfect a mechanical cotton picker, but so far none have proved commer-

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cially successful, and the crop is still picked by hand. The cotton fibre hangs from the bolls or pods, apparently ready to drop of its own accord, but it really clings somewhat tenaciously to its pod, and when picked or plucked therefrom the seeds come with it; in fact, the seeds are buried in the lint from which they can be removed only by the ginning process. When the picker's sack is full he carries it to the wagon, where it is weighed, as the pickers are usually paid by the pound, and at the close of the day hauled to the farmer's house and deposited on the porch or in some vacant shack until it is hauled to the gin. The cotton in this state is known as "seed cotton," as it contains all the seeds buried in the lint.

Seed cotton is seldom insured (most forms limiting their cover to "Cotton in Bales"), yet its fire hazard is not as great as after it is ginned and baled. Many insurance men will scoff at this statement, yet a few simple experiments will convince them of its truth. Seed cotton ignites easily but the fire usually flashes over the pile then goes out of its own accord. During the Civil War, when so much cotton was intentionally destroyed, it was found that other fuel was necessary to burn the seed cotton. If there was much of it in a warehouse the building might be burned down but a large pile of cotton would be left unconsumed. Lint cotton on the other hand when once ignited will smoulder and burn until all is consumed. Immersing a burning bale in water will not extinguish the fire, which continues smouldering and eating into the bale. Bales taken from the water after a week's immersion have burst into flame as soon as they were opened. I have heard many people say that if a bale of cotton that has been wet or has absorbed any great amount of moisture, is loaded tightly in a closed freight car, the hold of a vessel, or even in a warehouse, it is very liable to spontaneous combustion, but that theory is slowly being discredited and many inspectors now raise no objection to loading damp or wet bales.

Ginning. In due course the farmer hauls his seed cotton to the gin where the lint or fibre is separated from the seeds, by being passed through a machine containing a series of saws, from which the lint is brushed, then drawn by suction and blown to the baling press where it is compressed in a box 27 inches wide by 54 inches long, making a bale approximating 27.4 inches by 43.5 inches by 56.8 inches, having a density of about 12 lbs. per cubic foot and weighing about 500 pounds; the weights vary from 400 pounds to 650 pounds, the average now being about 520 pounds.

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During this baling process the bale is theoretically covered, but in practice only partially covered, with a very poor quality of coarse burlap and bound with five to seven "ties," i. e., iron bands weighing about one pound each. One excuse for only partially covering the gin bale is that it will probably be recompressed and the bagging is enough to cover the reduced package. This makes what is known as the "Gin Bale." When it is turned out of the press the ginner attaches a tag or ticket bearing the ginner's serial number and delivers the bale to the farmer with a ticket giving the gross weight. In some states the law requires the ginner to state also the tare or net weight, and to keep a record of all cotton ginned by him, and to make periodical returns of same to the government.

The seed which has been separated from the fibre is also delivered to the farmer or bought from him by the ginner who usually buys the seed for account of some cotton seed oil mill. The percentage of lint cotton recovered from seed cotton is approximately one-third of the gross weight of the seed cotton; thus for every 500-pound bale of cotton the farmer gets he should have 1,000 pounds of cotton seed worth from \$20 to \$40 per ton according to the market, which depends largely on the price of cotton oil. The charge for ginning varies from 40 cents to 60 cents per 100 pounds, the latter being the usual price. This charge includes the bagging used to cover the bale, also the ties. As the ginner furnishes these materials he usually purchases the cheapest grade he can get, most of the covering used being a very coarse jute bagging or burlap and much of it second hand. It is supposed to take from six to seven yards of 44-inch material, weighing $1\frac{3}{4}$ pounds to 3 pounds per yard to each bale, the average weight probably being something less than 2 pounds per yard. Seven yards at 2 pounds is 14 pounds, plus six bands at 1 pound makes 20 pounds, and the tare on these bales is usually figured at 20 pounds per B/C, which is 4 percent on a 500-pound bale, but tare is not deducted in selling or buying cotton in any of the primary markets; there the agreed price per pound is paid for the gross weight of the bale, as shown by the gin ticket or as shown on the scales when reweighed. When cotton is sold on some of the exchanges or to the mills, tare is deducted at from 22 pounds to 24 pounds per bale, or when exported, the tare taken on the Liverpool market being 6 percent of the gross weight. In some of the Continental markets the covering is removed, the cotton weighed and only the actual net weight is paid for.

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There are several makes of "Gin Compressors," which, unfortunately are not in general use though they put up a much better bale than the old type of "Gin" or "Box Press," one measuring approximately 20 inches by 26 inches by 24 inches, or 18 inches by 30 inches by 48 inches, with a density of about 33 pounds per foot, and tare of only 12 pounds. The "Compressed Bale," as turned out in the large compresses by the old Morse or Webb press, theoretically measures 18x28x56, with a density of 22 pounds per cubic foot, and tare of 22 pounds. This weighs, of course, the same as the "Ginned" bale, plus two or three extra ties, and such "patches" as may be put on.

THE COMPRESSED BALE

Gin bales are so light in comparison to their bulk that a box car cannot be loaded with them to even half of its weight carrying capacity, so to facilitate transport by rail or water they are usually "Compressed" or "highdensitized," for which purpose compresses are located at most of the central railroad points or junctions and ports in the Cotton Belt. These are huge machines operated by a direct acting steam piston in a 72-inch to 96-inch cylinder. The gin bale is placed in the machine, the bands taken off, the burlap loosened, and patches of burlap laid on the holes made by the sampling, then pressure is applied on two sides, that is, the top and bottom, and seven or eight new bands are put around it. This turns out the "Compressed Bale" which theoretically measures 18x28x56, with a density of 22 pounds per cubic foot, and tare of from 20 pounds to 22 pounds. While its greater density enables more bales to be loaded in a car or any other given space, it is far from being a satisfactory package on account of its irregular shape due to the pressure being applied only to the top and bottom, which makes the sides more or less rounded and leaves it of a somewhat oval shape.

All railroad rate quotations are based on the assumption that the bales will have to be compressed and include the charges for compressing which are paid by the railroad. Unless cotton is ordered shipped "Flat," i. e., uncompressed, and for which a higher freight rate is charged, the railroad company has the privilege of having the cotton compressed in transit at its expense. Thus cotton shipped from some small town in western Georgia to Savannah would be stopped en route at the first place where there was a compress, unloaded, compressed, and reloaded, all at the railroad's expense, and then sent through to Savannah.

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A new method of further compressing cotton is now coming into use especially for ocean shipment, known as the "High Density" press. These are much like the old type of press with side pieces added, which turns out a bale with four square sides.

There are also two or three methods of rolling cotton into "round bales," that is, the Lowry Press, making a bale of 38 inches by 18 inches, with an average density of 47 pounds per cubic foot, weighing 250 pounds; and the "American Round Lap Press," making a round bale 35 inches by 22 inches, with a density of 35 pounds per cubic foot, weighing 275 pounds.

A new hydraulic press, "The Standard Compress," makes a bale approximately 24x24x28 inches, having a density of about 33 pounds per cubic foot, which from my observation of many of them that have been exposed to fire, water and country damage, seems to be in every way the best square sided bale yet produced from an insurance standpoint. This makes a bale with square sides and ends that can be neatly and entirely covered, leaving no loose cotton to be set on fire by every spark that falls on it. The pressure is applied evenly on all surfaces so the strata or layers of cotton are not distorted and the sides of the bale are virtually calendered by the steel surfaces of the press, precluding its absorbing water or moisture as rapidly as the ordinary compressed bale does.

MARKETING

Cotton merchants or buyers can be divided into four general classes as follows:

The Factor is really a commission merchant to whom the planter or owner consigns cotton to be sold for his account either at designated price or to be sold on the market at the factor's discretion. These factors usually protect their clients by obtaining straight fire policies carrying the Commission Clause. Where the "General Floater" (Form No. 8 C) or "Limited Floater" (Form No. 9 C) is used, it sometimes requires much careful investigation to obtain a correct list of cotton under cover of the factor's policies and to ascertain whether any of the consignees have other insurance that should contribute to the loss. The factor's records are usually no better kept than the average run of cotton accounts and seldom show weights or grades, in the absence of which it is necessary to follow each bale back through consignee to ginnery to obtain the required information, unless the Assured is willing to set-

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tle on basis of average weight per bale, as shown by weight sheets of cotton passing through the burned warehouse or through some other warehouse in the same town.

The Merchant is a very ambiguous term as used in the primary cotton markets, but I should say it is generally applied to the men who make the buying and selling of cotton merely a side line to their more important business of general merchandising or banking. They obtain much of their cotton from advances of credit for merchandise or crop loans to the smaller planters, and their operations are generally confined to their home towns. These men usually carry only specific fire insurance policies.

The Buyer and Exporter. These last include by far the most important element in the cotton trade. Some of the larger firms operate in several states, having many resident buyers and branch offices in each state as well as in New York and Boston and some of them in Liverpool, Manchester, Havre, Bremen, etc. Some of these firms buy only in lots from the factors, merchants and larger planters, but many of them buy by the bale from the planters when they haul their cotton to town. Their representatives in smaller towns ship the cotton they buy to the large compresses where the firm "concentrate" their shipments. This term "concentrate" as used in the cotton trade, is often misconstrued by the laymen as meaning the act of compressing the bale to a greater density, but it means the gathering or assembling at some central point, (invariably at some large compress) of the purchases made in the adjacent territory. The firm may want 1,000 bales of good middling for some New England customer. They could not buy such quantity of one grade at any one place (except the larger Exchange points) without overbidding the market, but could probably select it out of 10,000 B/C of various grades shipped to point of concentration from their local representatives at twenty different places. This process of concentration is explained under the title Compresses.

The Spinner usually buys only for his own mill, and the cotton is seldom at his risk until it reaches the mill warehouse and comes under cover of his specific policies.

We will assume the planter hauls three or four bales of his ginned cotton into his market town. Leaving his wagon in the public square, he calls on some of the cotton merchants or buyers who inspect and take samples of each bale and offer him what they think

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the cotton is worth, or more properly speaking, the lowest price they think it can be bought for. If he accepts same, the buyer instructs him to deliver the cotton to some stated warehouse, which the planter does, obtaining a receipt for the cotton showing the weight and number of each bale. He takes the receipts to the buyer who probably gives him a draft on the local bank for the agreed price, which draft calls for the warehouse receipt to be attached to it.

Sampling, Classing and Grading. To obtain samples for grading or classing (the terms are synonymous) a deep cut is made through the bagging across the face of the bale and two or more liberal handfuls of cotton are pulled out; this sample will weigh from four ounces to one-half pound or more, according to the greed of the man pulling it. In many cases a sample is taken from each side of the bale, thus making a total of from six ounces to one pound. As a general rule a sample is drawn from a bale of cotton each time it is sold. These samples are jokingly spoken of by the buyers as "The City Crop." When they accumulate the buyers sell them for about 1 cent below the Middling price. Some compresses and warehouses also sample every B/C they take in; in fact, the amount of cotton accumulated by some compresses from this process has been the subject of legislative debate and threatened investigation. From the samples thus drawn the cotton is graded by an expert usually called a "Classer." All cotton is "Graded" according to its color, i. e., whiteness and purity or freedom from leaf, hulls, dirt or trash. The "Grade" has no reference to the "Staple," i. e., length of fibre, except that in the absence of any specification in the offer or contract between seller and buyer as to length of staple (i. e., fibre) it is assumed to call for "Upland" or "Short Staple Cotton," that is, a "staple" or fibre not shorter than $\frac{7}{8}$ of an inch or longer than one inch.

The samples are usually marked or carded with the number of the bale, either the gin number, or warehouse number being used, or the buyer may attach his own tag or ticket to the bale and use his own number. These samples are kept in the buyer's office until he sells and ships the cotton.

U. S. GOVERNMENT STANDARDS.

There have been many unsuccessful attempts to establish some uniform system of designating the different grades, and in 1914 the U. S. Congress passed what is known as "U. S. Cotton Fu-

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tures Act" (U. S. Statutes at Large, Vol. 38, P. 693, 2nd Sess. 63rd Congress) to which there have been several amendments and virtually a re-enactment in August, 1916. This act directed the Secretary of Agriculture to "Establish and promulgate standards of Cotton by which its quality or value may be judged or determined, including its grade, length of staple, strength of staple, color, and such other qualities, properties, and conditions as may be standardized in practical form, which, for the purposes of this act, shall be known as the 'Official Cotton Standards of the United States.'"

In order to enforce the adoption of these grades on the various Exchanges the act levies a tax "in the nature of an excise of 2 cents for each pound of cotton involved" in any sale for future delivery where such contract of sale is not based on or does not specify the grade in Official Cotton Standards. The act also provides for settlement of disputes between vendor and vendee through arbitration by the Department of Agriculture. The Secretary of Agriculture has now (September 1, 1916) established and promulgated twenty "Standard Grades" for short staple cotton as follows (see U. S. Dept. of Agriculture Service and Regulatory Announcements No. 10, issued 9/1/16).

U. S. GOVERNMENT STANDARDS.

(Promulgated Aug. 12, 1916.)

- (1) Middling Fair.
- (2) Strict Good Middling.
- (3) Good Middling.
- (4) Strict Middling.
- (5) MIDDLING.
- (6) Strict Low Middling.
- (7) Low Middling.
- (8) Strict Good Ordinary.
- (9) Good Ordinary.
- T 3 Yellow Tinged Good Middling.
- T 4 Yellow Tinged Strict Middling.
- T 5 Yellow Tinged Middling.
- T 6 Yellow Tinged Strict Low Middling.
- T 7 Yellow Tinged Low Middling.
- S 3 Yellow Stained Good Middling.
- S 4 Yellow Stained Strict Middling.
- S 5 Yellow Stained Middling.
- B 3 Blue Stained Good Middling.
- B 4 Blue Stained Strict Middling.
- B 5 Blue Stained Middling.

The numbering given in left-hand column is the writer's arbitrary system of numbering for convenient reference and has no relation to the Government Standards or any system of numbering recognized by the cotton trade.

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The American Standards are based on seven full grades, i. e., three above and three below the basis grade of Middling, thus:

Fair	}	M I D D L I N G	{	Low Middling
Middling Fair				Good Ordinary
Good Middling				Ordinary

The U. S. half grades are made by prefixing the word "Strict" to their full grade names.

In the Liverpool Standards the half grades are formed by prefixing the word "Fully" instead of the word "Strict," as in the U. S. Standards.

A further division is sometimes made to represent a quarter grade by prefixing the word "Barely." Thus "Barely Middling" is one-quarter grade below Middling.

Samples of the nine standard grades of white cotton can be bought from the Department of Agriculture for \$25.00. The New York, Boston, New Orleans, Dallas, Galveston, Augusta, Savannah, Memphis, St. Louis and all the other important Cotton Exchanges in the United States have adopted U. S. Official Cotton Standards. They have likewise been adopted by Rotterdam, but not by Liverpool. On September 1, 1916, the Liverpool Cotton Exchange promulgated and adopted a new "Series of Standard Grades," one for "American Upland Cotton," one for "American Gulf Cotton," and one for "American Texas Cotton," as follows. I give the Liverpool Standard with the nearest equivalent grade of the U. S. Standard as reported by the U. S. Department of Agriculture.

A comparison of the Liverpool Cotton Standards for American (Gulf) Cotton with the Official Cotton Standards of the United States for grade.

United States Standard	Gulf Liverpool standard	Remarks
Middling Fair.....		No equivalent.
Strict Good Middling.....	Middling Fair, $\frac{1}{4}$ grade above	Color brighter. Leaf equal.
Good Middling.....	Fully Good Middling, grade equal	Color equal. Leaf equal.
Strict Middling.....	Good Middling, $\frac{1}{4}$ grade below	Color equal. Slightly more leaf.
Middling	Fully Middling, grade equal..	Color brighter. More leaf.
Strict Low Middling..	Middling, $\frac{1}{2}$ grade above ...	Color brighter. More leaf.
Strict Low Middling..	Fully Low Middling, grade equal	Color slightly brighter. More leaf. Types variable, 4 above and 4 below.
Low Middling.....	Low Middling, grade equal ...	Color slightly brighter. More leaf. Types variable, 4 above and 4 below.
Strict Good Ordinary.....	Fully Good Ordinary, grade equal	Color grayer and less red. Slightly more leaf.
Good Ordinary.....	Good Ordinary, grade equal..	Color slightly grayer and whiter. Less red. Slightly more leaf and shale.
Good Ordinary.....	Ordinary, $\frac{1}{4}$ grade lower.....	Color grayer. More leaf and shale.

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A comparison of the Liverpool Cotton Standards for American (Texas) Cotton with the Official Cotton Standards of the United States for grade.

United States standard	Texas Liverpool standard	Remarks
Middling Fair .....	.....	No equivalent.
Strict Good Middling	Middling Fair, $\frac{1}{4}$ grade above	Color whiter. Leaf equal.
Good Middling	Fully Good Middling, $\frac{1}{4}$ grade below	Color equal. Slightly more leaf.
Strict Middling.....	Good Middling, $\frac{1}{4}$ grade below	Color equal. More leaf.
Middling	Fully Middling, $\frac{1}{4}$ grade below	Color brighter. More peppery leaf.
Strict Low Middling...	Middling, $\frac{1}{4}$ grade above.....	Color brighter. Slightly less leaf.
Strict Low Middling..	Fully Low Middling, grade equal	Color brighter. More peppery leaf and more variable.
Low Middling	Low Middling, grade equal....	Color brighter. More peppery leaf.
Strict Good Ordinary	Fully Good Ordinary, grade equal	Color brighter. Slightly more leaf.
Good Ordinary	Good Ordinary, $\frac{1}{4}$ grade above	Color brighter. More leaf.
Good Ordinary.....	Ordinary, $\frac{1}{4}$ grade below....	Color brighter. Larger and more leaf.

A comparison of the Liverpool Cotton Standards for American (Upland) Cotton with the Official Cotton Standards of the United States for grade.

United States standard	Upland Liverpool Standard	Remarks
Middling Fair .....	.....	No equivalent.
Strict Good Middling	Middling Fair, $\frac{1}{4}$ grade above	Color whiter. Leaf equal.
Good Middling.....	Fully Good Middling, grade equal	Color equal. Leaf equal.
Strict Middling.....	Good Middling, grade equal..	Color brighter. Leaf equal. Preparation poorer.
Middling	Fully Middling, grade equal..	Color slightly brighter. Leaf about equal.
Strict Low Middling...	Middling, $\frac{1}{4}$ grade above.....	Color brighter. Leaf slightly less.
Strict Low Middling..	Fully Low Middling, grade equal	Color equal. Leaf equal.
Low Middling	Low Middling, $\frac{1}{4}$ grade above	Color brighter. Leaf equal.
Strict Good Ordinary	Fully Good Ordinary, grade equal	Color brighter. More leaf.
Good Ordinary	Good Ordinary, $\frac{1}{4}$ grade above	Color grayer. Less leaf.
Good Ordinary	Ordinary, $\frac{1}{4}$ grade lower....	Color bluer. Leaf equal.

Beside the above there are trade definitions used in various districts that are too numerous to mention, such as "Dogtail," "Bollie," "Half and Half," etc. Bollie cotton is found principally in Western Oklahoma and the Panhandle districts of Texas, where owing to cold or late seasons some of the cotton does not mature sufficiently to warrant picking in the usual manner and the bolls are picked from the plant and put through a ginning process which leaves a much larger percentage of the boll or husk and dirt in the cotton than is permissible in any recognized grade.

Some few years ago a Georgia planter developed a hybrid variety of cotton which he tested in a certain district in Western Oklahoma producing an exceptionally heavy yield. The next year he sold this seed to planters in that vicinity who produced an unusually large crop, but when mature the cotton was found to lack both strength of fibre and length of staple to such an extent that

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it was difficult to find a market for it, though it required an expert classer to distinguish it from the better grade of cotton raised in that district. These are features against which the adjuster must continually guard when he is handling losses for claimants whose reputation or integrity is not above question.

Middling is the contract or basis grade. All market quotations and Exchange contracts for future delivery are made on Middling basis. The grades above Middling bring more than the market quotation for Middling and the grades below Middling bring less. These variations in price are known as "Commercial Differences" and change from time to time as promulgated by the Cotton Exchanges in what are known as "Spot Markets." If a contract for sale for future delivery reads "1,000 B/C May delivery, Subject to U. S. Cotton Futures Act, Section Five," the seller may tender any cotton grading from Good Ordinary up to Middling Fair, and settlement will be made by payment above or below the contract price of 15 cents Middling, on the Commercial Differences, for the grades delivered, as evidenced by the published quotations based on actual sales made at place of contract (if that place be a spot market) on the sixth business day prior to date of delivery. Under the United States Cotton Futures Act the Secretary of Agriculture has designated the following as Spot Markets; the quotations of which are to be used in determining differences.

Montgomery, Ala.
Little Rock, Ark.
Augusta, Ga.
Savannah, Ga.
New Orleans, La.

Boston, Mass.
Memphis, Tenn.
Dallas, Texas.
Galveston, Texas.
Houston, Texas.

Norfolk, Va.

The differences promulgated by the Secretary of Agriculture, for November 23rd, 1916, were as follows:

The following averages of the differences between grades, as figured from the November 23 quotations of the eleven markets designated by the Secretary of Agriculture, are the differences established for deliveries in this market on November 30:

Grade	Cents.	Grade	Cents.
Middling Fair	.80 on Mid.	Strict Middling	.21 off Mid.
Strict Good Middling	.56 on Mid.	Middling	.43 off Mid.
Good Middling	.34 on Mid.	Strict Low Middling	.77 off Mid.
Strict Middling	.18 on Mid.	Low Middling	1.17 off Mid.
Middling	Basis.	"Yellow Stained—	
Strict Low Middling	.27 off Mid.	Good Middling	.49 off Mid.
Low Middling	.66 off Mid.	Strict Middling	.70 off Mid.
Strict Good Ordinary	1.11 off Mid.	Middling	.95 off Mid.
Good Ordinary	1.57 off Mid.	"Blue" Stained—	
"Yellow Tinged—		Good Middling	.52 off Mid.
Strict Good Middling	.28 on Mid.	Strict Middling	.82 off Mid.
Good Middling	Even.	Middling	1.15 off Mid.

The Secretary of Agriculture has also promulgated definitions of certain grades of cotton that cannot be delivered in settlement of such contracts (S. R. A. Markets No. 10, September 1, 1916):

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Gin-Cut Cotton.

Gin-cut cotton is cotton that shows damage in ginning, through cutting of the saws, to an extent that reduces its value more than two grades, said grades being of the official cotton standards of the United States.

Gin cutting of a less extent than that mentioned above which reduces the cotton below the value of Good Ordinary would render the cotton untenderable though the extent of injury were less than that described, as the fifth subdivision of section 5 states specifically that cotton the value of which is reduced below that of Good Ordinary shall not be delivered on, under, or in settlement of a contract.

Reginned Cotton.

Reginned cotton is such as has passed through the ginning process more than once; also such cotton as, after having been ginned, is subjected to a cleaning process and then baled.

Repacked Cotton.

Repacked cotton will be deemed to mean factors', brokers', and all other samples; also "loose" or miscellaneous lots collected together and rebaled.

False packed cotton.

Cotton bales will be deemed false packed whenever containing substances entirely foreign to cotton, or containing damaged cotton in the interior with or without any indication of such damage upon the exterior; also when plated (that is, composed of good cotton upon the exterior and decidedly inferior cotton in the interior) in a manner not to be detected by customary examination; also when containing pickings or linters worked into them.

Mixed Packed Cotton.

Mixed packed cotton shall be deemed to mean such bales as show a difference of more than two grades between samples drawn from the heads, top, and bottom sides of the bale, or when such samples show a difference in color exceeding two grades in value, said grades being of the official cotton standards of the United States.

Water Packed Cotton.

Water packed cotton shall be deemed to mean such bales as have been penetrated by water during the baling process, causing damage to the fiber, or bales that through exposure to the weather or by other means, while apparently dry on the exterior, have been damaged by water in the interior.

Cotton of Perished Staple.

Cotton of perished staple is such as has had the strength of fiber as ordinarily found in cotton destroyed or unduly reduced through exposure, either to the weather before picking or after baling, or to heating by fire, or on account of water packing, or through other causes.

Cotton of Immature Staple.

Cotton of immature staple is such as has been picked and baled before the fiber has reached a normal state of maturity, resulting in a weakened staple of inferior value.

Cotton of Seven-eighths-inch Staple.

After investigation it is likely that a standard for cotton seven-eighths of an inch in length of staple will be issued. In the meantime,

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the examiners authorized to hear disputes will pull the cotton so that the ends will be squared off fairly well without unduly reducing the bulk of the drawn sample. When the measure is applied a fair quantity of the cotton must remain in order to show that the sample has not been pulled too fine before measuring. When thus pulled and measured as cotton experts are accustomed to do its fair average length shall be not less than seven-eighths of an inch, in order that the cotton be tenderable under a contract made in compliance with section 5 of the act.

Cotton that is less than seven-eighths of an inch in length of staple, that is, with a fibre less than seven-eighths of an inch long, will not be accepted as standard grade.

Long Staple Cotton. Cotton with a staple or fibre longer than one inch is known as "Long Staple Cotton," and is grown principally on the "bottom lands" of the Mississippi, Arkansas and White Rivers, and some sections of Texas, Arkansas, Arizona and California. This cotton is graded for color and purity the same as the short staple cotton and is also graded by 16ths of an inch for length of "Staple" or fibre over one inch up to $1\frac{1}{2}$ inches, and brings a premium or excess price according to its length. There is no set rule governing this excess price—as an example we give quotations from responsible firms in New Orleans and Vicksburg on April 1st, 1913:

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New Orleans.										Vicksburg.									
Grade.	1	1 ¹ / ₂	1 ¹ / ₂	1 ¹ / ₂	1 ¹ / ₂	1 ¹ / ₂	1 ¹ / ₂	1 ¹ / ₂	1 ¹ / ₂	1 ¹ / ₂	1 ¹ / ₂	1 ¹ / ₂	1 ¹ / ₂	1 ¹ / ₂	1 ¹ / ₂	1 ¹ / ₂	1 ¹ / ₂	1 ¹ / ₂	1 ¹ / ₂
Middling Fair.....	13 ³ / ₄	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Strict Good Middling..	12 ⁷ / ₈	14	16 ¹ / ₂	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Good Middling	12 ³ / ₄	13 ³ / ₄	16	17	18	19 ¹ / ₂	21	22	22 ¹ / ₂	22 ¹ / ₂	12 ¹ / ₂	12 ¹ / ₂	14	15 ¹ / ₂	16 ³ / ₄	17 ³ / ₄	19 ¹ / ₂	.....	.....
Strict Middling	12 ⁷ / ₈	13 ³ / ₄	15 ¹ / ₂	16 ¹ / ₂	17 ¹ / ₂	19	20 ³ / ₄	21 ¹ / ₂	22	22 ¹ / ₂	12 ¹ / ₂	12 ¹ / ₂	13 ³ / ₄	15	16 ¹ / ₂	17 ¹ / ₂	18 ¹ / ₂	.....	.....
Middling	12 ³ / ₄	12 ⁷ / ₈	15	16	17	18	19	20	20	20	11 ⁷ / ₈	12 ¹ / ₂	13	14	15	16	17	.....	.....
Strict Low Middling..	12 ⁷ / ₈	12 ³ / ₄	14	15	16	17	18	19	19	19	11 ³ / ₄	11 ³ / ₄	12 ¹ / ₂	13 ¹ / ₂	14 ¹ / ₂	15 ¹ / ₂	16 ¹ / ₂	.....	.....
Low Middling	11 ⁷ / ₈	12 ⁷ / ₈	13	14	15	16	17	18	18	18	11 ³ / ₄	11 ³ / ₄	12 ¹ / ₂	13	14	15	.....	.....	.....
Strict Good Ordinary..	11 ³ / ₈	12	12 ¹ / ₂	13	14	15	16	16	16	16	10 ⁷ / ₈	10 ⁷ / ₈	11	11 ¹ / ₂	12	13	14	.....	.....
Good Ordinary	11 ³ / ₈	11 ³ / ₄	12	12 ¹ / ₂	13 ¹ / ₂	14	14 ¹ / ₂	15	15	15	10 ³ / ₄	10 ³ / ₄	10 ³ / ₄	11	11 ¹ / ₂	12	13		

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These quotations show that the premiums are relatively higher for the grades above Middling and the penalties greater for the grades below Middling than with short cotton. Nevertheless, every additional one-sixteenth of an inch in the length of staple usually adds as much to the market value of the cotton as does a full grade in the grading. This is especially true for staples up to $1\frac{3}{8}$ inches in length. There is a greater difference of opinion, however, concerning length of staple than there is concerning the grade.

As noted above the government has now established twenty Standard Grades for short staple cotton. Long staple cotton comes in all these twenty grades, besides which it is graded by 16ths of an inch from 1 inch to $1\frac{1}{2}$ inches, making eight grades for each Standard Grade, or a total of 160 grades. Thus Good Middling $1\frac{1}{16}$ — $1\frac{1}{8}$ — $1\frac{3}{16}$ inches, etc. The writer recalls a loss where one claimant lost 372 bales which comprised sixty-eight different grades, the prices of which ranged from 14 to 29 cents per pound. Some exceptional grades of long staple cotton have sold for 45 cents per pound when the Middling basis was only 15 cents.

Sea Island Cotton is a distinct variety differing in many essential feature from both the Upland and Long Staple cottons. The plant grows much taller with smoother leaves and flowers of a brighter yellow, the bolls are smaller though longer and more pointed, the seeds smoother and almost bare of fuzz or lint. The fibre is longer and much finer, looking more like silk and resembling the Egyptian cotton which comes in competition with it for some purposes. The best Sea Island Cotton is grown on the islands off the Coast of South Carolina, that State, however, produces only an average of 8,000 four-hundred pound bales per annum. It is also grown on a narrow strip of Central Georgia, about one hundred miles from the coast, extending from the South Carolina to the Florida line, the County of Lowndes producing more than any other, and in four or five counties south of the line in Florida. Georgia produces about 50,000 and Florida about 30,000 bales, making the total average production about 90,000 four-hundred pound bales per annum. It costs much more to produce than any other variety, greater care is exercised in selecting the seed, in cultivating, picking, sorting, ginning and baling. It is ginned on a roller gin as the more rapid operation of the saw gin injures the fibre. The South Carolina cotton is put up in bags 7.5 feet long and about 2.5 feet in diameter. This is pressed in with a light hand-screw press, making a bale weighing from 300 to 400 pounds,

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and looking like the old style wool sack. The interior Sea Island cotton is packed by a steam press into bales about the same size and shape as the Upland cotton, but better covered with burlap secured by sewing instead of iron bands, and weighing only 400 pounds. The price of short staple Upland cotton has little bearing on Sea Island. Some extra fine cotton, with a staple two inches and over, from the Carolina Islands, brings from fifty to eighty cents per pound; but the supply and demand for such cotton is very limited. It is said that Queen Victoria would wear none but white cotton stockings, the material for which was selected from these island cottons. While she undoubtedly required stockings of liberal dimensions, her death would have caused no falling off in the demand if fashions had not changed until the modern woman would rather wear the cheap worthless imitation silk than the better looking and better wearing pure white cotton our grandmothers prized so highly.

Sea Island is classified according to length of staple by sixteenths of an inch, as explained above in reference to long staple cottons, and these classes are subdivided into five or six grades judged by color, purity and appearance, and designated Fancy, Extra Choice, Choice, Extra Fine, Fine and "Dogs." The most reliable quotations of Sea Island cotton are those promulgated by the Charleston and Savannah Exchanges, but they cannot be taken as definitely determining values of many types.

THE METRIC SYSTEM

As the metric system is slowly coming into more general use in the cotton trade, the adjuster will sometimes find the specifications of length expressed in millimeters instead of fractions of an inch, thus "29 M/M" standing for 29 millimeters. Unless the adjuster is accustomed to working in metric measures, he will have to convert them to the equivalent fractions of an inch for which purpose he should keep the following formula and table for ready reference.

Millimeters $\times .03937$ = inches.

Millimeters $\div 25.4$ = inches.

1½ inch=1.0625 of an inch, or 26.98 M/M.

1 1/18 inch=1.125 of an inch, or 28.57 M/M.

1¾ inch=1.1875 of an inch, or 30.15 M/M.

1¼ inch=1.25 of an inch, or 31.74 M/M.

28 M/M=1.10236 of an inch.

29 M/M=1.14173 of an inch.

30 M/M=1.18110 of an inch.

31 M/M=1.22047 of an inch.

32 M/M=1.25984 of an inch.

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PRICES—QUOTATIONS—COMPUTING VALUES

The published market quotations of cotton are always given in cents per pound for the United States markets and in pence per pound for the English markets. Unless some other grade is specified the quotations represent the price of Middling Upland. The fluctuation in price is always referred to as so many "points," a point being one-tenth of a mill or one-hundredth of a cent. Thus if yesterday's quotation was 10 cents (ten cents per pound) and you are told today the market has gone up 50 points it would mean the price has gone up to 10.50 cents. A difference of 100 points or one cent is \$5 on a 500-pound bale. Thus on a loss of several thousand bales a change of a few points makes a considerable difference to the underwriters.

The majority of compresses and warehouses issue separate receipts for each bale, and to facilitate checking the individual claimant's schedule to the warehouse and railroad records, salvage inventory, etc., it is usually well to list all bales from warehouse receipts in numerical order. I use forms printed specially for this purpose, ruled in tens and fifties so entries are easily counted, and have found that making these lists invariably saves time and expense in proving up a general balance sheet of the warehouse. It is impossible on these numerical lists to separate the cotton by grades, hence when you come to extend prices and figure values you must either make a separate computation and extension on each bale, or make up another list separating the cotton by grades without respect to numerical order, or adopt some system of averaging grade and price. Your numbered list will appear as follows: I give 10 B/C as an example and take the New York basis quotation of November 28th, 1916, which was 20.38, and the promulgated "differences" for that date which are given above.

Receipt No.	Grade and Staple	Weight	Difference	Price	Value
2001	Low Mid.	510—	.66	\$19.72	\$100.57
4	Mid.	505	basis	20.38	102.92
6	Good Mid.	520+	.34	20.72	107.74
2130	St. Mid. Tinged ...	485—	.21	20.17	97.82
2275	Good Ord.	530—	1.57	18.81	99.69
6	St. Mid. Stained ...	515—	.82	19.56	100.73
2460	Low Mid.	506—	.66	19.72	99.78
4	Good Mid.	502+	.34	20.72	104.01
2500	Mid.	508	basis	20.38	102.53
2702	St. Mid.	512+	.18	20.56	105.27
		<u>5093</u>			<u>\$1,022.06</u>

Prove the above extensions and footings and then think how long it would take you to price, extend, foot and re-check twenty schedules aggregating 10,000 B/C. Or try the other method of

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making out new schedules, separating the bales by grades, and you will appreciate the value of some short cuts, of which this is the simplest:

Bales	Differences On	Off	Total Points On	Off
2		.66		1.32
2	.34		.68	
1		.21		.21
1		1.57		1.57
1		.82		.82
1	.18		.18	
8				
2 Basis			.86	3.92
				.86
10			10	3.06 (
				.306

From the above you note the total points on are .86, the total off 3.92, net off 3.06 on 10 B/C, or an average of .306 off; basis of c20.38 gives us c20.074 as the average price of 5,093 pounds, which is \$1,022.37 as the value, a difference of only 31 cents from the specified method. Sometimes the difference of bale weights of certain grades preclude using such short cuts, but usually they are accurate enough for adjustment purposes.

LOCAL MARKETS

While in the majority of losses the actual or market value of the cotton can be ascertained by taking the quotations of the nearest "Spot Market" for the day of fire and deducting therefrom the cost of freight from scene of fire to market point, we find many cases where that method is not practicable, because the cotton grown in some districts, such as Northern Georgia and Western Oklahoma, owing to its stronger fiber and longer staple (though it may not be so great as to class it as long staple cotton) brings a premium of 10 to 25 points or over above the Exchange quotations for the general run of cotton of same grade. For instance, the spot quotation for Middling cotton at Dallas, Texas, may be 15 cents (Middling basis) on the day a fire occurs at Altus, Oklahoma. Freight from that point to Dallas, we will assume for the purpose of this example, is fifty cents per hundred pounds, or \$2.50 per 500-pound B/C. Therefore, taking the Dallas quotation as a basis, the market value at Altus would be only 14.50, yet we may find buyers at Altus were actually paying 14.75. The cause of this higher price or premium is that the Altus district produces cotton of better staple than the average run of Texas cotton handled through Dallas. Where several claimants have sustained losses by the same fire,

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all interested adjusters should refrain from closing any loss or definitely agreeing on the basis price with any individual Assured until all adjusters, or at least those representing the majority interests, have had ample opportunity to investigate, confer and agree, among themselves, on what basis price is to be taken in determining values of all cotton involved in the fire. The adjusters should always ascertain by examination of invoices, orders, telegrams and other records in the buyers' offices what "limit" they were giving, i. e., what price their local men were allowed to pay, at place of fire, and before reaching a decision discuss prices with the largest and most influential claimants. If such examination convinces the adjusters that the buyers were paying 14.75 for middling on day of fire, they should agree on that figure as the maximum basis price to be allowed in settlement of any loss and all should adhere strictly to that basis. If an adjuster deviates from the agreement and pays any claimant, even for a few bales, above the agreed basis, news of such action invariably reaches all Assured and causes needless trouble and dissatisfaction in the settlement of all other losses. Even if the adjusters take a week to investigate and determine the question of price, during that time they can be checking up the various statements and ascertaining grade and quantity lost by each claimant, and as it is customary in the settlement of all large cotton losses to advance from 70 percent to 90 percent of any claimant's estimated loss as soon as title and approximate quantity is ascertained without waiting to determine grade and price, such delay imposes no hardship on the Assured. Where a loss is not settled on the basis of Spot Market Exchange quotations the adjuster's reports should show why any other figure was taken.

COTTON FUTURES

Although losses are usually adjusted on the "Spot" market basis and quotations, the adjuster will find many purchases, sales and quotations based on the Future markets. A loss may occur in September and the Assured argue that the burned cotton was sold for delivery in December at so many points on "New York December," and that as soon as he learned he had lost 500 B/C by the fire, he bought December Futures for 500 B/C and therefore the loss to him is the value of the burned cotton based on the December Future quotation. Before the adjuster can intelligently discuss this feature with his claimant he must understand what this "Future" and the buying and selling "Hedges" really mean. Let us suppose

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that in July a cotton mill in Massachusetts is asked by one of its customers to quote them a price on so many thousand yards of cloth, of stated specifications, for March delivery. The mill, not wishing to gamble on the price they might have to pay for the necessary cotton, say 1,000 bales of Strict Middling, during November and December, buys from some cotton broker, usually a member of one of the large Cotton Exchanges, 500 B/C of November Futures and 500 B/C of December Futures, at the July quotations for those months and uses those prices as a basis to figure on the offered order. All the mill has to do to obtain these future contracts is deposit a satisfactory margin (from \$1 to \$5 per bale) either in cash or by established credit, with the broker, and in return receive a valid contract calling for the delivery of 500 B/C in November and 500 B/C in December, but this contract gives the seller the option of delivering cotton of any grade from Good Ordinary to Fair, the price when invoiced being adjusted according to the grades actually delivered based on the published "Differences" at time of delivery. As the mill could not use six or seven different grades in making up their cloth, the cotton delivered on this Future Option might not meet their requirements and they therefore ask some of the cotton dealers or merchants to quote them prices on the desired grade, i. e., 1,000 B/C Strict Middling F. O. B. New Bedford, November and December delivery. John Doe & Co., Dallas, Texas, quote them a price of 15 cents, which they accept, and the order is confirmed in the usual manner. You will note their contract with Doe calls for the delivery of 1,000 B/C Strict Middling (the grade they require) and Doe will not be permitted to deliver any other grade and adjust on the differences as in the case of the Future Contract mentioned above, so the mill now knows exactly what the required cotton is going to cost them and if they have confidence in Doe's ability to fulfill their contract or pay the necessary damages if they fail to fill it, the mill may close out their Future Contract, or if they doubt Doe's financial standing they may decide to hold it until Doe makes delivery.

When Doe made this sale to the mill he did not own 1,000 B/C Strict Middling, but expected to buy it from the crop then maturing. He did not wish to speculate on the price any more than the mill did, and only wanted to make a legitimate trading profit from buying the cotton in the ordinary course of his business during the season between his making the sale in July and making delivery as called for in December. In making his offer of 15 cents he figured the price as follows:

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New York December Future	12.80
Plus for Strict Middling	.18
Freight Dallas to New Bedford	.85
Insurance	.10
Buying Expenses	.50
Profit	.50
	<u>14.93</u>

If Doe can buy the required 1,000 B/C at an average cost of 13.05 per pound F. O. B. Dallas he will make fifty points, or \$2.50 per bale profit, but suppose the market steadily advances when the season opens and Doe finds when he has succeeded in accumulating the 1,000 B/C that it has cost him an average of 14.05 per pound instead of 13.05 F. O. B. Dallas. In that case Doe would lose 50 points or \$2.50 per B/C. To protect him from such possible loss Doe "hedged" his sale to the mill when he made it in July by buying 1,000 B/C December Futures at 12.80. While Futures and Spots do not always advance and decline in the same ratio, the inequality or disparity that sometimes appears in the quotations need not be considered here. We shall therefore assume that the future market advanced in the same ratio as the spot market, and in November, when Doe was ready to deliver the 1,000 B/C to the mill, December Futures were quoted @ 13.80, this would give Doe a profit of 100 points when he closed or sold his future contract, as he would do as soon as he made delivery to the mill, and would offset his loss through having paid 14.05 for the actual cotton instead of his estimated cost of 13.05.

Taking the other side of the case let us assume the market had continued to decline after Doe made his sale in July, and he was able to accumulate the 1,000 B/C at an average cost of 12.03 instead of his estimated cost of 13.05 F. O. B. Dallas. December Futures would decline at the same rate and when he closed out his future option he would have to pay his broker from whom he bought it, the difference between 12.80, the price at which he bought the option, and 11.80, the quotation for December Futures when he closed it out. Thus, if the market advances, his gain on the future option offsets what he loses by having to pay more than he estimated for the actual cotton, and if the market declines his loss on the future option offsets whatever he may have gained in having bought the actual cotton for less than he had estimated.

Suppose Doe finds about October 30th that he has purchased 500 B/C more than he has orders for. He anticipates obtaining orders for all the cotton he can buy during the season, but as the market is fluctuating with an apparent tendency to decline he does

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not care to speculate by holding so much actual unsold cotton, besides which his bank from whom he has borrowed at least 90 per cent of what the cotton has cost him does not care to carry a loan of \$75 per bale on cotton that may be worth only \$70 next week, and \$65 the week after. In order to insure both the bank and himself against any material loss through the decline in market price of the cotton he is holding, Doe can sell the 500 bales of December or January Futures.

It is now in order to discuss the conditions as to ownership and liability under which cotton may be found in different warehouses and compresses, and for this purpose we need only consider one of the larger compresses situate at an Atlantic port, for they usually produce examples of all conditions.

COTTON IN COMPRESSES.

Cotton in compresses falls under the following classes or conditions. (For convenience of reference I have designated these as Class "W," "S," "C," etc.)

1. *Class "W"—"Warehoused Cotton."* Cotton held on storage by a compress company as warehousemen and for which they have issued receipts which generally carry some of the usual clauses stamped or printed thereon to the effect that the compress company "Is not liable for loss by Act of Providence or loss by fire." Under these receipts the compress company, and therefore their insurers, are not liable for loss to cotton held thereunder unless it is claimed such cotton comes under protection of policies carrying the "Commission Clause" as set forth on page 488. Under the common law decisions the warehouseman is not liable for loss by fire to property in his charge unless he has specifically assumed that liability or agreed to insure the property, and the insertion of any clause excluding loss by fire does not change his position in the premises. The same condition as to liability exists where no receipts have been issued as under class "C," "K" and "H."

2. *Class "S"—"Storage Cotton."* Cotton held by a compress company on storage as warehousemen and for which they have issued receipts with notice printed or stamped thereon to the effect that said cotton is insured. The compress company is liable for fire loss to such cotton, and their insurers would be liable to it under policies carrying the usual "Commission Clause" reading: "Owned or held by the assured in trust, or on commission, or on joint account with others, or sold but not delivered."

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3. *Class "C"—"Consigned Cotton."* Cotton consigned to buyers in "Care of Compress Company" under the usual form of "Straight" or "Open" B/L or under "Order" B/L, and which the compress company, as agent of the consignee, has received from the railroad company, has receipted for, and has or has not unloaded. In the absence of any agreement to the contrary neither the compress company nor its insurers are liable for loss to such cotton (unless they can be held liable under the "in trust" wording in the commission clause), and the railroad is released from liability under its B/L the moment the compress company receives and receipts for the cotton.

4. *Class "K"—Consigned Cotton—Cotton Shipped Under Straight or Open Bill of Lading, or Under Order Bill of Lading, Which is Not Consigned To or In Care of the Compress Company.* Cotton consigned under open or order B/L to "John Doe, Cottonville, Texas" (and not as in Class "C" "care of Compress Company"), and which the carrier, without any direct orders from consignee or consignor, has delivered to the compress company, and for which the compress company has receipted and unloaded. In these cases it is often difficult to determine who is liable for loss by fire occurring within forty-eight hours after notice of arrival has been duly sent or given the consignee. The deciding point is, "Did the compress company receive and unload the cotton as agent of the carrier or as agent of the consignee?" This, as explained in the next paragraph, may depend on the custom of the carrier, compress and cotton buyers in handling cotton at that particular point.

5. *Class "L"—"Inbound Bill of Lading Cotton."* Cotton consigned as described in classes "C" and "K," but which was still in the carrier's custody, in that no one purporting to represent the consignee had receipted for the cotton or otherwise released the carrier. The uniform bill of lading, which is known and designated as "Standard Form of Order Bill of Lading approved by the Interstate Commerce Commission by Order No. 787 of June 27, 1908," and most forms of open B/L contain this clause:

"No carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God . . . For loss, damage or delay caused by fire occurring after forty-eight hours (exclusive of legal holidays) after notice of the arrival of the property at destination, or at port of export (if intended for export) has been duly sent or given, the carrier's liability shall be that of warehouseman only."

The railroad, under such bill of lading, is liable to the consignee for loss occurring within forty-eight hours of the consignee's

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receipt of the above required notice, providing the consignee has not received the shipment and released the carrier prior to the expiration of said forty-eight hours, but the carrier is not liable for loss occurring more than forty-eight hours after the consignee has had notice of arrival.

There are many decisions showing a wide range of difference as to what constitutes the required forty-eight hours' notice, some computing forty-eight hours from the hour the required notice is received; others construing it as requiring two full business days' notice. Various railroads follow different methods of issuing these notices, some allowing their agents to give verbal notice, and others mailing postal cards to consignee's address, irrespective of any verbal notice being given.

It is a common custom of the railroads to deliver to the compress all cotton consigned as above shown in Class "K," unless the consignee is a local consumer (i. e., mill operator) or a local buyer known as owning or using another warehouse. Some railroads make a practice of obtaining written orders from the buyers concentrating their cotton at compress on their line, instructing the railroad to deliver all cotton consigned to such buyers to designated compress in the specified town. Such orders make the compress company the consignee's agent to receive their cotton, and the compress company's receiving such cotton (irrespective of whether the compress company or the railroad company actually does the unloading) releases the railroad company from all liability, and when so received the compress company holds the cotton as warehouseman for the consignee.

Where the railroad has failed to obtain such written orders the necessary understanding or agreement may frequently be shown and approved by long standing custom at the given point.

6. *Class "C"—"Cotton Under Clearance,"* i. e., cotton for which the owners have given the compress company what is usually termed a "Press Order" or "Shipping Order." These orders usually show the receipt numbers of the bales of cotton to be shipped, said receipts being surrendered therewith and the necessary shipping orders attached. In exchange for this press order and warehouse receipts for the cotton covered thereby, the compress company gives the shipper or owner a "Clearance Receipt."

Some railroads constitute the compress company their representatives or agents to receive cotton for shipment, and in such cases

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the railroad will issue their Bs/L in exchange for these "Clearance Receipts" in the same manner as the B/L would be issued if the cotton covered thereby had been actually loaded on the car and the car sealed by the railroad company. Where the compress company represents the railroad in this manner it usually gives bond to the railroad for the faithful performance of its duty, and carries insurance written in the name of the compress company "for account of the railroad company," the policies stating that the insurance covers the common carrier's liability of the railroad company and/or the liability of such compress company to the railroad company. This insurance also covers transit cotton. (See policy form No. 302 attached.)

The general construction placed on such policy is that cotton held by the compress company under clearance receipts, but which has not been loaded on cars, and the cars sealed and delivered to the railroad company, is held by the compress as agent for the carrier, and not as warehouseman, and such cotton, therefore, is not usually held as coming under cover of the "Warehouseman's" policy, though a liberal construction of the Commission Clause might hold it so covered. This is only another example of the danger to the assured from the custom now so generally followed by many brokers of inserting the Commission Clause in all merchandise or warehouse forms.

Where B/L is issued before cotton is actually loaded, the liability still falls on the compress company as the carrier's agent, but the owner of the cotton should make claim under the bill of lading against the railroad as a common carrier.

As soon as the cotton is actually loaded the compress company delivers a "Loading Notice" to the railroad agent and obtains said agent's receipt therefor. The signing of this receipt releases the compress company and their insurers from all liability and brings the cotton under Class "O," passing the liability on to the railroad as common carriers under their B/L, and thus bringing same under cover of the railroad company's policies covering their common carrier's liability, unless, as is frequently the case, such policies specifically exclude cotton from their protection.

7. *Class "O"—"Outbound B/L Cotton."* That is cotton to be shipped from the compress, which has been loaded on cars, the cars sealed and the receipt acknowledged by the railroad company through their issuing B/L thereon. Such cotton is at the carrier's

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risk, and neither the compress nor their insurers are in any way liable therefor.

8. *Class "T"—"Transit Cotton."* That is cotton shipped under through B/L from some inland point consigned to some distant place (usually some port or New England point) that has been unloaded at the compress to be compressed and then forwarded to final destination as shown by the B/L.

In accepting cotton for shipment from any interior point, unless the consignors order the same "to go through flat" or uncompressed, the railroad company reserves the right or privilege of stopping same in transit at any compress on its lines and have it there compressed at the carrier's cost. This right of compression in transit is recognized and authorized by the Interstate Commerce Commission (see R 585); the published freight schedules are based on cotton being so compressed, a much higher rate being charged where it is shipped through uncompressed. This privilege of compression in transit is for the benefit of the carrier in that it enables them to load almost twice as many bales of compressed cotton in the ordinary box car as they can load of uncompressed cotton. Thus transit cotton in any compress to which it has been sent by the carrier for such compression is, so far as the owner of the cotton is concerned, solely at the carrier's risk. Some railroads have contracts with the various compress companies on their lines providing for the manner in which transit cotton is to be handled, and in some cases the contracts define the compress company's position in respect to all cotton received from and shipped by such railroad. Such contracts should be carefully examined as well as the state statutes, railroad commissioner's rules, etc., and, if an interstate shipment, the Interstate Commerce Commission's rules should be carefully examined in all cases where any such question of liability is involved.

It was recently decided in a case taken on appeal to the Supreme Court of New York (*Leo L. D'Utassy v. Southern Pacific Company*) that even where a shipper indicates his preference of the compress in which the cotton is to be compressed in transit by endorsing the B/L submitted for the railroad's execution "To be compressed at Cleveland Compress Company, Houston, Texas," the railroad is not thereby released from liability for burning of cotton while being so compressed, nor is the railroad under any obligation to observe such instruction, it being privileged to have

the cotton compressed in transit at any point it deems expedient. In that particular case the consignor was part owner of the designated compress, the burning of which destroyed the cotton, yet the railroad was held liable as common carrier and had to pay the consignor the value of the cotton.

THE WESTERN WEIGHING AND INSPECTION BUREAU.

The various railroads have so many different customs, rules and forms under which they handle cotton that one can explain only a few of them in a paper of this character. Texas and Oklahoma are the only districts where there is any general rule recognized and followed by all railroads and compresses. All roads operating in those states are members of, and combine in maintaining, the "Western Weighing and Inspection Bureau." This organization employs inspectors who supervise the loading and unloading of all cotton at the Texas and Oklahoma compresses, as follows:

On receipt of way-bill the railroad agent furnishes compress superintendent with memorandum of billing on W. W. & I. B. Inbound Cotton Report" (form 853).

On receipt of above memo, car seals are broken by, and cotton unloaded under supervision of, the W. W. & I. B.'s inspector, and as the cotton is unloaded and moved into the press, the compress company's men make up a "weight sheet" (form 102) which carries the following data:

WEIGHTS

On	Bales Cotton for Account of				
From			Station		R. R.
Car No.	Initial	B/L	W/B	Marks	
Number of B/C	Signed for on B/L		S/O—B/L		

Press Tag	Shipper's	Actual	Net	S/O
No.	Tag No.	Weight	Dockage	Weight No. Class

Not Responsible for Loss or Damage by Fire, Flood or Other Agencies, Unless Caused by the Wilful Act or Gross Negligence of The Compress Company. Not Negotiable.

Date and Hour Unloaded	Weighed by	Supt.
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The cotton is weighed as it passes into the press and the compress tags attached thereto, and when the inspector finds it checks

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out with the amount called for in the inbound report (form 853) a "Receiving Slip" (form No. 101) is issued in triplicate and signed by the inspector and superintendent, one copy of which is turned over to the railroad agent, one copy retained by the inspector, the triplicate being retained by the compress superintendent. The compress superintendent's signature to this report is official acceptance of and completes the delivery from the railroad to the compress. The superintendent issues the compress company's receipts (form No. 104) for the number of bales called for by the inbound report and turns said receipts over to the railroad agent, who holds same until surrender of B/L (if shipment is under Order B/L), and payment of freight expense bill. Where the consignee has established the necessary credit with the railroad by giving bond or otherwise, the compress agent sends the receipts for open B/L shipments direct to the consignee, and the railroad agent draws on consignee for freight charges. The consignee is not required to surrender the Open B/L's to railroad, but must surrender an Order Bill of Lading before he can obtain the compress or warehouse receipts.

The compress superintendent sends one copy of weight sheet (form No. 102) to consignee retaining the manifold for the compress company's files. Some compresses pull two samples of each bale as it passes under the scales and send one sample with the weight sheets to the consignee, keeping the other sample themselves.

Shipment of Cotton from Compresses is made as follows:

The shipper makes out a shipping order carrying the tag number and marks of the bales to be shipped, attaches thereto compress company's receipts covering said bales and bill of lading form filled out as required showing consignee, destination, etc., ready for signature. The shipper sends these papers to the compress who locate the identical bales ready for shipment. They are then loaded on cars under supervision of the W. W. & I. B.'s inspector, who checks off each bale as loaded on what is termed an "Outbound Report" or Loading Report (form No. 105). As soon as loaded the inspector seals the car and signs the report, which is also signed by the compress superintendent. The inspector's signature to this report constitutes delivery from the compress company or shipper to the railroad company. One copy of the report is given to the shipper and one copy to the railroad agent with the bills of lading attached, which he will sign and deliver to the shipper on surrender of the

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duplicate copy of the Outbound Report. Under this system the compress company issues no clearance until the cotton is actually loaded, and the railroad will not issue or sign bills of lading until they are furnished with the inspector's Loading Report. This report is considered equivalent to a bill of lading and the railroad is liable for any loss occurring after it is issued, even if the bill of lading has not been signed.

The above seems an excellent method and is the best I have encountered, but is far from fool proof, as you will note from the following case, which is yet in litigation. B, a cotton buyer located at X, bought 200 B/C from C, located at Y, terms F. O. B.—Y, and ordered same shipped under Order B/L to him (B) care of Compress at X. C shipped this cotton as ordered, attached draft for face of invoice to the B/L, which was sent to the bank at X for collection. These 200 B/C reached the compress at X on May 1st, on which day the railroad notified B of arrival, as required by the B/L conditions. The compress company (under supervision of the W. W. & I. B.'s inspector) unloaded, weighed, and sampled the cotton and sent weight sheets and samples to B (who received them May 2nd) and sent the "receiving slip" and compress receipts to the railroad agent to hold until surrender of B/L and payment of freight. B was in no hurry to meet C's draft and take up the B/L or pay the freight, for he had his samples and weights and might as well have the use of that money until he wished to ship or deliver the cotton. On May 10th D, an exporter with headquarters at Dallas, came to B's office at X, looked over the samples of this cotton, and agreed to buy the 200 B/C for \$16,000. D. gave B. a draft on D's firm for \$16,000, which draft required the compress receipts for the 200 B/C to be attached to it when presented for acceptance. As explained above, B could not obtain these receipts which the railroad agent held, until he had paid C's draft, obtained the Order B/L, surrendered same to the railroad, and paid the freight from Y to X. The compress, with these 200 B/C was totally destroyed by fire at 1 a. m., May 11th. On May 12th B. paid C's draft, took up the B/L which was attached thereto and tendered same with the freight charges from Y to X, to the railroad's agent and demanded the compress receipts for the 200 B/C. The railroad agent refused to surrender the compress receipts saying the railroad's General Claim Agent had instructed him not to surrender any receipts or take any action that would change conditions as they existed at time of fire. D refused to

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pay the draft for \$16,000 without the receipts attached. B, D and C each carried open reporting policies (Form 300) in different companies, covering their cotton as soon as it became "the property of the assured or legally at his risk." The compress company carried the ordinary fire policies form with the Commission Clause. The railroad also carried insurance on its common carrier's liability. C's insurers refused to pay for this cotton claiming it had been sold to B, whose insurers refused to pay claiming it had been sold to D. As D could produce no evidence of title and would not pay B because he could not deliver the receipts, D's insurers refused to admit liability. The railroad presumably acting on the advice of their insurers, denied liability as more than 48 hours had elapsed between B's receiving notice of arrival and burning of the cotton. This placed B between the devil and a deep sea that did not look either blue or inviting. C had fulfilled his contract when he loaded the cotton at Y, so B had no recourse in that direction.

By suing D as his vendee he would bar himself from making any claim against his own insurers, or against the railroad. B's insurers held the cotton was not at his risk, as the property right had passed to D. On the other hand if, setting himself up as the owner of the cotton, he sued the railroad and failed to recover from them, he could hardly bring another action against D as his vendee. B worried over the problem for several months during which period the interested insurers, or at least their adjuster, was not always asleep at the switch, and finally B, being a resourceful gentleman, or possibly being well advised, brought suit against the railroad *not for the loss of the cotton or its value*, but for damages he sustained by failure to collect D's \$16,000 draft through the railroad's refusal to surrender the receipts to which he was undoubtedly entitled when he tendered C's Order B/L and the freight charges called for thereby. As this action is still pending in the courts I must refrain from making any comment on the question of liability. In fact, I have heard that B has been persuaded to amend his complaint and is now endeavoring to recover from the railroad as common carriers for the value of the cotton, and if such is the case and he obtains judgment against the railroad, they in turn will recover from their insurers, which was a contingency the adjuster was endeavoring to avoid.

Even where the railroads maintain such organizations as the Western Weighing and Inspection Bureau, we cannot assume that

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delivery to or by the carrier can only be made as prescribed by the bureau's rules, for unfortunately local customs or state laws frequently require us to recognize other methods.

Under the laws of some states the railroads must accept cotton whenever it is tendered at any of their platforms, even though they have no available cars to ship it in, and in several instances we have recovered from the railroad for cotton so tendered although no B/L had been issued.

PUBLIC WAREHOUSES

From the time it leaves the gin until it reaches the mill or factory, comparatively little cotton is handled or stored in private warehouses, that is, warehouses where none but the owner's own cotton is handled, so we will eliminate the private warehouse from this discussion and consider only those warehouses in which cotton is stored for various owners, or for any one who may offer it for such storage. We will assume that John Doe owns and operates a warehouse with a capacity of 5,000 bales, situate on a side track of the Air Line Railroad in the Town of Cottonville.

John Doe issues warehouse receipts reading:

"Received of George Smith.....one bale of cotton in apparent good order. Mark G. S. Weight 500 lbs. Deliverable to bearer upon return of this receipt and payment of charges."

Nearly all warehouse receipts contain a clause reading: "Risk of fire excepted," or some similar wording. We often find the only record kept by such warehousemen is what is usually known as a "Bale Book," which gives the numbers of the receipts issued, with more or less detailed information, sometimes giving the date of issue, to whom issued, and marks and weight of bale; against which is subsequently entered the date of shipment and number of Clearance or Loading Order on which same was shipped. There are many cases, however, in which the Bale Book carries no information other than the number of the receipts issued and possibly a cross or some other pencil check to indicate which receipts have been surrendered and cancelled either by transfer or shipment, without giving date of issue or cancellation—that is, there will be such entry if the warehouseman does not forget to make it when he cancels the receipts. Some warehouses do not weigh the cotton when received, hence there is no record of weights. Some warehousemen use a manifold receipt form, leaving the carbon for their permanent files. Others use a receipt with stub, which stub we find they frequently fail to fill out.

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You will note that these warehouse receipts are invariably worded so as to preclude the warehousemen being held liable for loss by fire. Under the common law, unless the warehouseman had specifically agreed to assume liability for loss by fire, he would not be liable for such loss, unless it were proved the fire was due to his own negligence, so it would seem there is no necessity for the receipts referring to the fire risk, except in those states where they have attempted to make the warehouseman liable for any loss, whether the same is caused by fire, the acts of God, or otherwise.

These public warehousemen usually agree, when specifically requested, to insure cotton stored with them, for which they make an extra charge over and above their regular storage charges, and their agreement to insure such cotton may be evidenced in various ways, the usual method being to stamp with a rubber stamp the word "Insured" on the receipts covering the cotton which the warehouseman has agreed to insure.

The production of a receipt stamped "Insured" is not, however, conclusive evidence that the holder of the receipt or owner of the cotton has any claim against the warehouseman for insurance on it, for the original owner or bailor, say a farmer or local merchant, who first placed the bale in the warehouse and told the warehouseman he wished him to insure it, may shortly after sell said bale to some large buyer. The warehouseman may be advised of this sale, and knowing the buyer always insures his own cotton, the warehouseman would know he would not pay him for keeping it insured, and therefore would mark it off his list of insured cotton, if he happened to keep such record, which unfortunately many of them do not. When we find such receipts marked "Insured" in the hands of the large buyers carrying Buyer's Transit or Per Bale Policies, we do not insist on holding them as covered under the warehouseman's policies, unless we can find some record of parol evidence of their being insured, for the account of buyer or holder other than the mere stamp on the receipt, but if such record is found, they should be held as covered under the Warehouseman's Policies, which would be contributing insurance with Fire Policies issued to the owner or holder of the receipt, but if the owner or holder of the receipt was insured under Marine Policies (Form M), said Marine Policies would not cover such cotton, as the Marine Companies are wiser than their cousins in the fire business, in that their policies contain a clause reading:

"Warranted by the Assured free from any liability for merchandise in the possession of any carrier or other bailee who may be liable for

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any loss or damage thereto; and free from any liability for merchandise shipped under a bill of lading containing a stipulation that the carrier may have the benefit of any insurance thereon; and that any assurance against fire granted herein shall be null and void to the extent of any fire insurance which the assured or any carrier or other bailee has, at the time of the fire, and which would attach if this policy had not been issued."

The clause I have just read is very interesting when considered with the Commission Clause now found on—I think I am safe in saying—the majority of fire insurance policies covering warehouse stocks of merchandise. In cases where the warehouseman is carrying insurance issued to John Doe covering on cotton in warehouse, his own or held by him in trust, or "sold but not delivered," or for which he is legally liable, there is little chance of the warehouseman's insurers avoiding liability, even though the receipts are not stamped "Insured," and bear the usual legend excluding liability for fire risk.

We will assume that George Smith, a local merchant in Cottonville, bought three bales of cotton from a farmer, whom he told to deliver it to John Doe's warehouse, have it weighed, bring the receipts to him, and he would pay the agreed price. The farmer hauled this cotton to the warehouse and received from John Doe three receipts, each for one bale, marked "G. S.," weighing, say, 500 pounds, which receipts he handed to George Smith, who in turn gave him a draft on the Farmers National Bank for \$150, attaching the three receipts to said draft. The farmer presents the draft to the bank, which pays him \$150, charging it to George Smith's account, and puts the three receipts with other similar receipts, which the bank holds as collateral, in an envelope marked "George Smith." Mr. Smith, as before stated, is a local merchant running a general store. Buying cotton is only a side issue with him. He may carry specific fire policies covering specifically in John Doe's warehouse, as per Form 10C, or he may know that John Doe carries insurance under Form 10C and after he has settled with the farmer, he may telephone Doe telling him to insure these three bales, which Doe agrees to do, but as the receipts have already been issued without being stamped "Insured," there is no record made of the transaction. Frequently Smith omits to telephone Doe and forgets all about insuring this cotton until the fire occurs, then he conveniently thinks:

"Why, no, I could not possibly have been so thoughtless as that. I must have told Doe to insure it," and he immediately calls Doe up over the 'phone and says he supposes Doe has sufficient insurance to cover that cotton, reminding

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him that he had telephoned him to insure these three bales. Doe may say he does not remember having received such notice, but he has sufficient insurance to cover all the cotton, so will let it go at that, and John Doe's insurers pay for it. On the other hand, he may flatly deny receiving any order or instructions to insure, and possibly not having sufficient insurance to cover his own cotton, plus that which he knows he has agreed to insure, he tells Smith that he must look elsewhere for his protection.

Now Smith may sell most of his cotton to the Chino-American Cotton Company, who carry a Marine Policy, Form M, or Buyers' Transit Policy, Form 300, issued by some of the Fire Insurance Companies, so goes to the agent of the Chino-American, and endeavors to, and undoubtedly sometimes does, persuade him to include the receipts for these three bales with the cotton which the Chino-American Company lost by the same fire, which the Chino-American can easily do, providing they are dishonest and have no consideration for the insurers. As I will shortly explain, these frauds can only be detected and prevented by detailed audits of the buyers' books.

I have never come in contact with any class of men whose standard of business honesty and integrity equals the better class of cotton buyers and exporters, but unfortunately there are a few who do not recognize any moral obligation to their insurers, and who will not hesitate to take advantage of any loop-hole and make claim for the loss of cotton, for carrying which the insurers would never have received any premium if the fire had not occurred. I will cite a few more examples of this evil, as they illustrate some features for which the adjuster must always be on the lookout.

You may think this is a fraud which could easily be detected and prevented, and it might be if the companies issuing per bale policies insisted on the assured making daily reports including all the information the policy calls for. The Per Bale Policy contains a clause reading:

"Warranted by the assured as a condition of this insurance that all purchases and sales and/or shipments of cotton insured hereunder shall be reported daily, (Sundays and holidays excluded) to this Company, and that an accurate record shall be kept by the assured of all such purchases, sales and/or shipments, showing the dates of all such transactions and other particulars affecting this insurance—which record shall be open to the inspection of an authorized representative of this Company on request."

One form in general use contains the clauses:

"When this policy becomes effective the assured agrees to report to this Company through its Agent as named herein, all cotton in his or

their possession and thereafter to REPORT DAILY, SUNDAYS AND HOLIDAYS EXCEPTED, all purchases, sales and/or shipments of cotton made by him or them, including in this report the value of all such sales and/or shipments."

"The assured under this policy hereby covenants and agrees to keep a set of books, showing a complete daily record of all cotton handled, showing among other things the weight and classification of each bale, and all purchases, sales and/or shipments with the identity of each bale and its location and removal from yards or compress to other locations, and in case of loss to produce such books to this company or this policy shall be void."

But possibly because they thought the enforcement of these clauses would make the adjustment of cotton losses merely a pleasant pastime, they considerably retained the clause reading:

"It is understood and agreed by this Company that unintentional omissions and/or errors on the part of the assured in reporting cotton purchased, sold or shipped, in accordance with the requirements of this policy, do not vitiate this insurance and the assured agrees that he will pay premium, at the rates agreed, on all such omissions and/or errors."

We often find some local merchant who has had cotton on which he carried no insurance, which he intended, or hoped, to sell to some friendly buyer who carried an open reporting policy, but before the sale was consummated the cotton was destroyed by fire. The merchant then hands his warehouse receipts to his friend, the buyer with the open policy, or even a specific fire policy, who reports it to the adjuster as his own cotton. Suppose the adjuster calls for sales contracts or confirmations or invoices and drafts covering payments; they may produce confirmations or invoices which have been made after the fire though showing dates prior thereto and claim policy requirements as to reporting had been complied with as the purchase was reported "weeks ago" in Section One of the Daily Report for some date which they cannot specify. This statement as to the report is in many cases a difficult one to prove or disprove, as the records may be so carelessly kept that the purchases reported in Section One cannot be traced. If they allege the cotton has been paid for, that can usually be proved and traced through the bank records, for I have never met a cotton man who had the audacity of many of our New York claimants, who will say when driven into a corner that they borrowed the cash from a relative and paid it direct to the seller. The competent and experienced adjuster can generally frustrate these nefarious schemes, but only at the cost of a great deal of time and labor, for where a buyer handles 200,000 or more B/C in a season, purchased in small lots of one or two up to fifty bales, if his records are in bad order it may take two or three weeks of difficult auditing work to prove

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out the accounts. Another method by which the assured under these open policies sometimes endeavors to collect for the cotton of some friendly uninsured merchant, and upon which the underwriters never would have received premiums, is for the assured, the merchant, and several of their employees to make affidavits to the effect that the merchant was buying the cotton for the assured's account and then to support this by an affidavit from the banker who had financed the purchase for the merchant stating the assured had said the merchant was buying for his account and that he (the assured) would guarantee all advances the bank made to the merchant.

Several years ago a compress containing about four thousand bales of cotton burned in a small town in the South, a place—I should say—of seven or eight thousand inhabitants, but in which, owing to its being an important railroad junction, a great deal of cotton is handled. I had nothing to do with adjusting this loss, but two or three years later my investigation of a second cotton fire in the same town disclosed the following facts concerning the first fire. Up to a year or two preceding the first fire, there were many specific Fire Policies issued by the local agents covering on cotton in that town. The agents had complained about losing the business, and it was suspected that some of the buyers holding Open or Reporting Policies had promised the local merchants from whom they bought more or less cotton that in the event of loss on cotton held by the merchant they would bring it under the protection of the buyer's policy, and although such cotton was not at the buyer's risk at time of loss, or properly under cover of the Open Policies, the Underwriters would probably be called on to pay for it. There were another compress and several independent warehouses in that town; a number of merchants were buying cotton on the street and taking same from their customers in the usual manner. There was no specific or other fire insurance carried by the merchants, although they undoubtedly owned several thousand bales of cotton. As far as I could ascertain from my investigation made two years later, the buyers holding reporting policies produced compress receipts for all the cotton claimed to have been burned, and the adjusters seem to have accepted these receipts as satisfactory evidence of ownership without auditing the accounts to prove title and paid the claims without any question.

In my judgment the situation was one which warranted the adjuster's making a complete audit of all the compress, warehouse,

railroad and buyers' records. The experienced adjuster has no difficulty in obtaining access to all these records, as the banks, railroads, and large buyers will always assist him if fraud is suspected.

A year or two later a third fire occurred in a warehouse in this same town. The warehouse books showed there were several hundred bales more of uninsured cotton contained in the warehouse than could possibly have been destroyed. The warehouseman carried no insurance, and the only interest we had in determining the amount of uninsured cotton was in connection with the unidentified salvage, and to preclude any assured collecting for his friends' uninsured cotton. The warehouse had burned so that a reasonably accurate count of the bales could be made, from which we could establish approximately how many bales had been destroyed. The warehouseman admitted that his books were wrong, stating he had undoubtedly delivered some cotton and cancelled or destroyed the receipts, which he had failed to mark off the bale book. We made him advertise in the local papers, asking all who held his warehouse receipts to send them to a certain bank for examination. This resulted in bringing to light five receipts which the warehouseman finally agreed was all the uninsured cotton contained in the warehouse, although his books showed there were several hundred bales. We know there were several hundred warehouse receipts held by two merchants, upon which no claim was ever made, but which would undoubtedly have been presented by some assured if we had not checked up all the other warehouses and the season's shipments through the railroad records. I recall several instances, some of which I will mention later, where claim has been made for cotton, supported by the warehouse receipts, that we have proved by the railroad records had been shipped out of town before the loss occurred.

RAILROAD AND COMMERCIAL TERMS

Controversies frequently arise over the construction of familiar commercial and railroad terms, and I will attempt to give you a few of the most generally recognized and what I believe are the correct definitions.

The terms most frequently encountered in the adjustment of cotton losses are:

- (1) F. O. B. is the abbreviation of "Free on Board."
- (2) F. O. B. (Named Point) is the abbreviation for "Free on Board at point named."

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- (3) F. O. B. (Named Point) F. A. is the abbreviation for "Free on Board (at named point) Freight Allowed."
- (4) F. A. S. (Named Port) is the abbreviation for "Free Along-side Vessel."
- (5) F. O. B. SS (Named Port) is the abbreviation for "Free on Board Steamship" at Named Port.
- (6) C. & F. is the abbreviation for "Cost and Freight."
- (7) C. I. F. is the abbreviation for "Cost, Insurance, Freight."
C. A. F. is the abbreviation for "Cost, Assurance, Freight," meaning the same thing.
- (8) O. R. and S. R. are abbreviations, respectively, for "Owner's Risk" and "Shipper's Risk."
- (9) S. L. & C. is the abbreviation for "Shipper's Load & Count."
- (10) L. C. L. is the abbreviation for "Less than Carload Lots."

F. O. B., the abbreviation for "Free on Board," means free on board car, lighter, or ship and not delivery in warehouse or compress. For example, if the terms of sale are "F. O. B. Cottonville," without any designation as to routing, and the buyer knew when making the purchase that the identical cotton bought was then in Cottonville, the *seller* must, at his own cost and expense:

- (1) place the cotton on or in cars or lighters furnished by the transportation company serving, or most conveniently located, to the warehouse where the cotton is stored in Cottonville;
- (2) secure clear bill of lading consigning cotton to the buyer;
- (3) as he has to secure clear bill of lading, the seller is, of course, responsible for any loss or damage to the cotton until it has been loaded and clean bill of lading obtained;

Under these terms the *buyer*

- (1) accepts responsibility for any loss or damage incurred after issue of bill of lading;
- (2) is responsible for and must pay all transportation charges including demurrage, if any;
- (3) arrange for all subsequent movement of this shipment.

In other words, the seller has completed his contract by loading the cotton and obtaining bill of lading.

If the terms of sale were "F. O. B. Dallas," the seller would be required to prepay the freight from Cottonville to Dallas and the cotton would be at the seller's risk, and he would be responsible for all loss or damage thereon until the shipment arrived at Dallas.

Where the contract of sale or confirmation reads, "F. O. B." without naming any point, it is assumed to mean F. O. B. cars or lighters furnished by the carrier serving the warehouse or compress where the cotton is located at time of sale. Suppose the terms are "F. O. B. New Orleans," and the buyer knew the cotton was at

some other point at time of sale, the seller would only be required to deliver the cotton free on board the incoming conveyance taking it to New Orleans. If, however, the buyer knew the cotton was in New Orleans at time of sale, the only construction that can be placed on the term "F. O. B." is that it requires the seller at his own cost and expense to place the cotton on such outgoing conveyance as the buyer may designate.

Nearly all export sales of cotton are made on "C. I. F." (named port) terms. This requires the *seller* to:

- (1) Secure the necessary freight contracts carrying the goods to the named destination;
- (2) deliver the cotton to the carrier;
- (3) pay all freight charges to destination;
- (4) secure clear bill of lading covering shipment to destination;
- (5) obtain and pay for the necessary marine insurance payable to the consignee or his order.

Under these terms the seller is responsible for all loss or damage until the goods have been delivered to the carrier, clean bill of lading with the required marine insurance secured, properly endorsed and negotiated by delivery to the buyer or his agent. The buyer is responsible for loss and damage occurring thereafter, for which he must make claim on the carrier or underwriter according to who may be responsible therefor. The buyer must also pay all costs of unloading or discharging, lighterage, and landing at destination, and all customs duties and wharfage charges.

The only difference between the "C. I. F." and "C. & F." terms is that under the latter the seller is relieved from the responsibility of insuring the shipment. The other terms need no further explanation.

In adjusting cotton losses and auditing cotton accounts we sometimes find the assured will attempt to construe "F. O. B." as meaning one thing when he is making up his Daily Reports or premium statements and place a very different construction on the term when a loss occurs. For instance, we will find John Doe with headquarters at Dallas has been purchasing cotton at the tributary points such as Fort Worth, Greenville, Paris, Dennison and Sherman, his confirmations reading "F. O. B. Dallas," and purchases were not shown on his Daily Report as coming at his risk until landed at Dallas, but when a loss occurs at Sherman he will make claim on his underwriters for loss on cotton destroyed at warehouse at Sherman, which he had purchased under confirmation

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reading "F. O. B. Dallas," alleging the agreement between buyer and seller was that he accepted delivery of the cotton where it lay at Sherman at time of purchase, and that the term "F. O. B. Dallas" referred only to terms of payment, he agreeing to pay for the cotton when landed in Dallas. In other words, instead of buying "F. O. B. Dallas," the terms really were "In warehouse @ Sherman freight allowed to Dallas." If we are forced to admit the assured's contention and accept liability for the cotton at Sherman, I require a letter over the assured's signature explaining his construction of the terms and stating that the term "F. O. B. Dallas" in his confirmations has always been construed as referring only to payment and that both buyer and seller have always understood that he accepted delivery of the cotton as it lay at the local point at time of purchase. We then forward this letter to the interested underwriters and suggest they demand an audit of the assured's accounts for previous years, going as far back as it is possible to obtain the necessary records, and make up premium statements based on the assured's construction, which would require him to pay at least one-eighth of one percent more premium on all cotton he has handled.

Another controversy which sometimes arises is the question of allowing what are known to the trade as freight expense bills. The railroads make "common point quotations"; that is to say, the freight to Galveston from the smaller towns tributary to Dallas, i. e., Fort Worth, Greenville, Paris, Dennison, and Sherman—is the same as the freight from Dallas to Galveston. When John Doe has cotton shipped from Sherman to Paris under local bill of lading, he is charged the local freight rate from Sherman to Paris, which, considering the distance, is several times higher than the rates from Sherman to Galveston. When Doe pays this freight bill, which we will assume is \$1.50 per bale, he obtains a receipt which entitles him to credit for the full amount paid when he reships the cotton to Galveston or other "common point." Theoretically, this credit is supposed to be given only when the same identical bales are reshipped, but in practice he can obtain this credit on any shipments. The object of this arrangement is to permit buyers to concentrate—that is, assemble and sort their cotton at points where there are compresses or other necessary facilities. Supposing a compress at Paris burns with 100 bales of Doe's cotton. The compress could not be rebuilt and in operation within the period during which Doe could get credit for his \$150 worth of expense bills

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applying to the burned cotton. In other words, as a result of the fire Doe is prevented from obtaining any credit or benefit for the \$150 freight he has paid on having the cotton shipped into Paris, whereas if it had not burned he would have obtained credit for the full \$150. If John Doe had sold this cotton as it lay at Paris, say for \$80 per bale, he could have made his invoices for \$8,000 plus \$150 expense bills, attaching the bills to the invoices, which would be as good as cash to the buyer when they came to ship the cotton to port or New England point. The assured contends therefore, that the actual market value of cotton subject to credit of these expense bills is the market value plus the expense bills, and the assured's actual loss by the fire is the market value plus the expense bill, for which the underwriters should compensate him, and they usually do.

COTTON INSURANCE FORMS

The Commission Clause

There are now in general use two different methods of insuring cotton, i. e., "Specific Insurance" written in the usual manner under various forms attached to the Standard Fire Policy, and "Per Bale Insurance," written under forms attached to the Standard Fire Policy, or somewhat similar forms attached to the "Marine Cargo Policy." Copies of these "Per Bale" forms are given in the appendix, and the adjuster should have a thorough understanding of their construction and application before taking up any loss. The specific insurance forms are promulgated by the S. E. U. A. and similar organizations, and for convenience of reference we have designated them by the S. E. U. A. numbers. There is no form in general use covering "Seed Cotton" (i. e., cotton as it is picked from the plant and before it is ginned) or "Loose Cotton" (i. e., cotton not baled). All forms specify "Cotton in Bales." All the specific forms carry the "Commission Clause," and therefore cover cotton, owned by the assured; held by the assured in trust; held on commission; held on joint account; and sold by the assured but not delivered or removed. All these specific forms except 13-A cover all cotton in bales coming under any of the conditions of the Commission Clause, which the assured might have at the specified locations. Form 13-A covers "not exceeding" the stated amount on each specified bale which it requires to be designated by marks and numbers. The Commission Clause in this form contains the additional wording "or upon which advances have been made," presumably meaning only advances made by assured.

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The only wording of the Commission Clause that need be considered is "Held by assured in trust"—this includes all that could come under cover of the other headings which are only surplusage. The Commission Clause is the subject of another lecture, and I only call attention to some few points in order to impress upon you the necessity of understanding and always having this clause in mind when handling losses under specific policies. This clause as originally worded in the good old times, read "... for which the assured is legally liable," the purpose of that wording being to *exclude* from cover of the policy *all property of others for which the assured was not legally liable*. The change in punctuation and substitution of the words "or for" in place of the word "for" brings in an element of danger, especially under the Co-insurance or Average Clauses, to both Insurer and assured, from which I believe the Insurers only escape annoying complications and serious losses because many local and special agents, the insuring public and the majority of attorneys, do not appreciate its possibilities. As far as the cotton insurer's interests are concerned, there is what almost amounts to a tacit understanding that the operation of this clause shall be ignored to a certain extent, and where we find the warehouseman or other bailee carrying policies containing it, which were undoubtedly taken out with the intention of covering only such cotton as he had agreed to insure, or for which he was legally liable in event of loss, we do not endeavor to bring all the other cotton in the warehouse under cover of such policies. I would suggest that those who are studying this subject should read the decision in the "Baltimore Warehouse Case."

Home v. Baltimore Whse Co. (U. S. Supreme Ct., 1876), 93 U. S. 547, 6 L. J. 39.

Hough & Clendenning v. Peoples Ins. Co. (Md. Ct. of Appeals, 1872), 36 Md. 398, 5 Bennett 418.

Utica Canning Co. vs. Home Ins. Co. (N. Y. Sup. Ct. 1909) 116 N. Y. 934, 38 Ins. Law. Jour. 813, and the authorities cited therein.

In the Baltimore Warehouse case the charter and by-laws of the warehouse company required that each warehouse receipt it issued should contain on its face a notice that the property mentioned therein was held by the corporation as bailees only, and was not insured by the corporation, and all the receipts bore that legend. The policy under which this action was brought stated that it did—

... insure Baltimore Warehouse Co. against loss or damage by fire to the amount of \$20,000, on merchandise hazardous or extra hazardous, their own or held by them in trust, or in which they have an interest or liability, contained in, etc."

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The warehouse company had some property of their own in the warehouse, besides which they were doing a public warehouse business and had, of course, a lien for charges on all storage goods.

The court held that in construing the clause "merchandise held in trust," the phrase "in trust" is to be understood in its mercantile sense and not confined to property held by legally appointed trustees; that the policy in question covered all the merchandise in the warehouse; that the warehouse company could collect the full loss on all merchandise, and after deducting for their own property and charges on storage goods, hold the balance in trust for owners of the other merchandise.

The court further held that while the wording of the receipts was notice to the holders that the warehouse company were not insurers of the property, neither that wording nor anything in the charter or bylaws precluded the warehouse company from obtaining insurance to the full value of the goods left with them.

The court further held that where the owners of the merchandise had taken out specific policies in their own names such policies, together with the warehouse company's policies carrying the Commission clause, constituted double insurance and the loss should be apportioned between them accordingly.

It is well to consider this case in connection with the various cotton insurance forms carrying the Commission Clause, as a thorough understanding of the subject may enable the adjuster to avoid many pitfalls.

This brings us to consideration of a subject upon which I have observed many claimants, agents and adjusters are dangerously ignorant, that is,

What constitutes a sale or a delivery, and when does the cotton "become the property of the assured or legally at their risk?":

or what is termed in the Common Law, "A bargain and sale of goods." The point of greatest interest to the adjuster is, when does the title to, or property right in, the goods bargained for pass from the vendor to the vendee so as to bring same legally at the risk of the vendee and make him liable for any loss thereto.

At the principal ports or exchange centers such as New York and New Orleans, there are rules and recognized customs of the Cotton Trade and Exchanges, which clearly define how and when title and risk passes and delivery is made. For instance, at those

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points where all cotton sold is weighed each time it is sold, title passes and delivery is made from seller to buyer as each bale passes under the scales, but in the smaller places there are no such established rules or customs, and the question is often a very difficult one to decide. You will probably think that the various Cotton Exchanges and similar associations would have adopted rules or by-laws definitely defining how delivery was to be made and exactly at what stage of the transaction the property right passed and the cotton became at the risk of the buyer, but unfortunately such is not the case. Only a few of the exchanges have adopted such rules, and they are more or less ambiguous. We seldom find a large cotton loss where annoying complications are not raised over this point, and it would seem as if the interested parties, that is, the underwriters, banks, railroads, and cotton buyers, could well afford to employ some competent man as a missionary to visit the various exchanges and persuade them all to adopt uniform rules governing this feature of their business.

The trend of modern trade customs is making this question too important to the adjuster of manufacturing and warehouse losses to warrant my attempting more than a rough outline, especially in a paper of this character, but I call attention to some of the principal points involved giving a few citations which will indicate the course of reading necessary to continue the study.

First, let us take the Common Law Rule that a "bargain and sale" can only be made when the vendor possesses the articles sold in such deliverable state that no act of the vendor's is required such as weighing or measuring, to separate or segregate them from other stock or otherwise positively identify the specific articles sold. If you offer to sell something you do not own or which requires labor on your part to put into deliverable condition, you can only make an "Executory Contract of Sale" that you intend to execute at some future time, and the title would not pass until it was executed. Under the Common Law rule, if a seller makes a proposition which the buyer accepts and the goods are then in possession of the seller with nothing further required to put them into deliverable condition, such as weighing or measuring to separate or segregate them from other stock, the title and property right in the goods sold passes from seller to buyer on the latter's acceptance of the offer and no written memorandum, confirmation, bill of sale or physical delivery is required.

From the above you will note that payment is not necessary to complete the sale; true, the seller may refuse to deliver the goods before payment or satisfactory credit arrangements have been made, but title to the goods passes and they are at the buyer's risk as soon as he accepts the seller's offer.

Where the goods are not designated by marks or numbers, or segregated from other stock, or where anything remains for the seller to do to put the goods in deliverable state, title does not pass until such work has been performed and the goods sold are segregated or otherwise specifically designated.

In 1676 England enacted the "Statute of Frauds." This has been copied with some variations by many other countries, including most of the United States; in fact, Texas is the only State I recall that has no "Statute of Frauds" stating how a sale of chattels must be validated. In that State the Common Law rule would still be in force but for the fact that Texas came to us from the Spanish and not the English line, and was therefore under the Latin and not the English Common Law, yet the decisions seem to indicate the Texas courts have accepted the Common Law rule. Though differing in some details these statutes as a rule provide that all contracts for the sale of goods, chattels or things in action, above a stated price (ranging in different States from \$50 to \$300) shall be invalid unless the contract or some note or memorandum thereof be in writing; and in most States the Law requires this writing to be subscribed or signed "by the party to be charged or his agent."

The Statute of Frauds did not materially change the Common Law rule, as far as any interest the adjuster may have in the subject is concerned, other than to require, at least in most States, some written evidence of the transaction to be signed or subscribed by the party to be charged or his agent. This does not necessarily mean there must be a formal Bill of Sale or confirmation given. It was held in *Halsell et al. v. Renfrow et al.* (U. S. Sup. Ct. 1906) 112 U. S. 287, that a complete contract binding under the Statute of Frauds may be gathered from letters, telegrams and writings between the parties relating to the subject matter and so connected with each other that they may be said to fairly constitute one paper relating to the contract. This case was carried to the Federal Courts on appeal from the Supreme Court of Oklahoma, whose Statute of Frauds require "Some note or memorandum thereof in writing to be subscribed by the party to be charged or his agent."

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As I have recently closed two cases which furnish very good examples of several of the questions discussed in this lecture, I will give you the report I made to the Underwriters which recites all the facts and outlines the law and decisions on which I based my findings. The only changes I have made are the substitution of fictitious names for the parties.

ADJUSTER'S REPORT.

FIRE: GRAHAM, OKLAHOMA, MARCH 21ST, 1916.

ALLEGED SALES BY JOHN DOE OF 104 B/C TO
RICHARD ROE AND 50 B/C TO FRANK BROWN, ALL
WHICH WAS DESTROYED IN ABOVE FIRE.

Both the vendor, Doe, and the vendees, Roe and Brown, had reported this cotton to their Underwriters as being under their respective policies (Form No. 300 and Form M), and the question of liability between the respective underwriters turns on the point of what constitutes a sale or when does title pass to cotton sold in Oklahoma? As shown in the following memorandum I have been unable to find any recognized rule or established custom of the cotton trade that would have any bearing on the question involved, and it therefore seems as if we must be largely, if not entirely, governed by the statutes, Common Law rules and decisions.

1. *Statute of Frauds*: Revised Laws of Oklahoma, 1910, Chapter 12, Article 2:

"941. The following contracts are invalid, unless the same or some note or memorandum thereof be in writing and subscribed by the party to be charged or his agent:"

"Fourth. An agreement for the sale of goods, chattels, or things in action, at a price not less than fifty dollars, unless the buyer accept or receive part of such goods and chattels, or evidences, or some of them, of such things in action, or pay at the same time some part of the purchase money; but when a sale is made by auction, an entry by the auctioneer in his sale book, at the time of the sale, of the kind of property sold, the terms of sale, the price and the name of the purchaser and person on whose account the sale was made is a sufficient memorandum."

Decisions:

(a) Delivery will not take a contract out of the Statute where same is to a carrier on the defendant's order, to be shipped to a third party, and by carrier delivered at place of destination.

T. & K. Hdwe. Co. v. Minneapolis Threshing Machine Co. (Oklahoma Supreme Ct., April 20th, 1908), 95 Pac. Rep. 427.

(b) An order for goods which is sought and procured by the seller is to be deemed as accepted by him at once and if signed by the buyer becomes a contract binding on him within the Statute of Frauds, and no other acceptance or notice of acceptance is necessary.

Cameron Coal & Merc. Co. v. Universal Metal Co. (Oklahoma Supreme Ct., July 12, 1910), 110 Pacific Rep. 720.

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(c) A verbal sale of cotton worth more than \$50 is invalid where samples are delivered as mere specimens.

Moore v. Love, 57 Mississippi 765 (1880).

(d) A complete contract, binding under the Statute of Frauds, may be gathered from letters, telegrams and writings between the parties relating to the subject matter and so connected with each other that they may be said to fairly constitute one paper relating to the contract.

Halsell et al. v. Renfrow et al. (U. S. Sup. Ct., 1906), 112 U. S. 287; appealed from Sup. Ct. of Oklahoma, September 3, 1904, 78 Pac. Rep. 118, 140 Okla. 674.

See also California, Colorado, Maryland, Minnesota and Mississippi decisions in line with above.

Common Law Rule.

(e) By the Common Law Rule if the seller makes a proposition and the buyer accepts same and the goods are then in possession of the seller with nothing further required to identify them or prepare them for delivery, the title and property in the goods sold passes from seller to buyer on the latter's acceptance.

(f) Where the goods are not designated by marks or numbers or segregated from other stock or where anything remains for the seller to do to put the goods in a deliverable state, title does not pass until such work has been performed and the goods sold are segregated or otherwise specifically designated.

(g) "Until the property which is the subject of sale, is designated and defined it is as if it were a sale without a subject matter in *esse* which cannot take effect in *praesenti*, for the want of that necessary ingredient in the sale to act on and it is, therefore, necessarily executory and incomplete. The purchaser, in such a sale, cannot maintain an action to recover *specific property*, if delivery be refused, because he has no right to any specific part of the bulk, an undefined portion of which he has contracted for. In such an action he must describe and identify with reasonable certainty, according to its character, the property he sues for, and this he cannot do, because his rights are indefinite, and cannot be attached to or located in any designated part of the mass. He has not that *jus in re* which alone entitles him to recover, and without which his purchase is incomplete. This reason does not exist where the subject matter of the sale is designated and defined, as where the whole bulk is sold. It is true, it may have to be weighed, counted or measured; but if this is to be done to enable the parties to make a settlement and not for the purpose of completing the sale, the right passes to and vests in the purchaser, but title does not pass when any of these operations are necessary to separate the goods from a larger mass of which they form a part. If the entire mass is sold and must be measured or weighed merely to ascertain the price for the purpose of settlement the better opinion on principle and authority is that title passes when the sale is made."

See Benjamin on Sales, Parsons on Contracts, and other authorities.

In considering the above it must be remembered that the Oklahoma Statute of Frauds is very explicit in that it requires some memorandum to be "subscribed" by the purchaser.

2. Rules of the Oklahoma State Cotton Exchange:

The only rule I have been able to find having any bearing on the question involved is Rule 1, reading:

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"A contract for the sale of cotton shall be deemed final when the price, quantity, quality, time and place or places of delivery have been agreed upon between the buyer and seller, and no contract can be rescinded without the mutual consent of both parties thereto; and, unless otherwise provided for at the time of sale, merchantable and deliverable cotton shall be guaranteed by the seller; compress weights shall be guaranteed by the seller."

Clause 4; Rule 2:

"Rejections: All bales rejected shall be replaced within three days by merchantable bales, unless mutually agreed otherwise."

3. *The Custom of the Cotton Trade:*

I quote from Doe's letter of July 5th, 1916:

"In making a basis Middling sale it is commonly understood that both the buyer and the seller have the right to reject a bale when the class is not satisfactory. For instance, when delivering a list of cotton if not satisfied with the class on certain bales I have the right to reject such bales and replace with others. Also the buyer has the right to reject such bales as he does not think the seller had classed correctly, such bales to be replaced by other cotton."

The above is my own understanding of the trade, and is corroborated by the largest cotton buyers I have interviewed in Oklahoma, which buyers further stated when discussing this question that there is no established rule governing f. o. b. or such sales as those under consideration which could be construed as having any bearing on the question of when title passes.

4. *Custom of Assured:*

See Paragraph 11 following.

5. *Custom at Linton, Okla.*

There is no Exchange or other association of the cotton men at Linton, nor any recognized custom other than cited above.

6. *Vendor, John Doe:*

Lives and has his office at Linton, Oklahoma, which is some sixty miles by rail from Graham, Oklahoma, where the cotton involved was located and burned. Doe is a local cotton buyer doing a comparatively small business.

7. *Vendee, Richard Roe:*

Is a cotton buyer operating on a large scale with headquarters at St. Louis, Mo., from which office all his purchases are made, but he has an agent or "Take-up Man" named Harrison, residing at Oklahoma City.

8. *Vendee, Frank Brown:*

Frank Brown is a cotton buyer living and having his office in Memphis, Tennessee. He maintains no office in Oklahoma, but was

in Linton, Oklahoma, on March 21st, on which day the cotton involved was burned at Graham, Oklahoma.

9. *Sale of 104 B/C to Richard Roe.*

There were no verbal communications between Doe and Roe, and no written communications excepting the following telegrams which were in cipher and are decoded below:

(a) March 17, 1916. John Doe, Linton, Okla., to Richard Roe, St. Louis, Missouri:

"Offer hundred four bales class ten points on Middling eleven three-quarters. Answer immediately."

(b) St. Louis, Mo., 6:10 March 17, 1916. Roe to Doe:

"Will take hundred four eleven half basis Middling subject regular terms. Take up by Harrison. Confirm tonight. Rising."

(c) St. Louis, Mo., 7:43 p. m., March 17, 1916. Roe to Doe:

"We accept hundred four eleven five-eighths basis Middling. Confirm answer by wire."

(d) Linton, Okla., March 17th. Doe to Roe:

"All right. Confirm hundred four at eleven five-eighths basis Middling."

10. *Location and Ownership of the 104 B/C Offered Above:*

On March 17th, 1916, when the above sale was made, Doe had only sixty (60) B/C at Graham, Oklahoma, viz:

3 B/C held under compress receipts Nos. 20121, 25447 and 25449, but I have been unable to determine definitely whether Doe actually owned these 3 B/C on March 17th, 1916, and it would seem that these 3 B/C were not included in the 104 offered to Roe, which—according to Doe's statement and records—were made up as follows:

3 B/C shipped from Cordele, Okla., March 3, 1916, by Morristown gins under Frisco B/L D-89 O/N B/L M. F. These were received and unloaded at compress at Graham on 3/7/16.

54 B/C shipped from Cordele, Okla., March 15, 1916, by W. A. Wilson, under Frisco B/L O/N John Doe. These were received and unloaded at compress at Graham, on March 16th.

The remaining 47 B/C with which Doe intended to fill this sale to Roe were shipped by John Hall from Cordele, Okla., on March 15, 1916, under Frisco B/L D-97 O/N John Doe. These were received and unloaded at Graham Compress on March 20, 1916.

As far as I have been able to ascertain the only other cotton Doe held on March 17th was a few bales at Linton, Oklahoma.

On March 17th the bills of lading with drafts attached, drawn on Doe to cover the purchase price of the 54 B/C and 47 B/C above noted were in transit and were in due course presented to the Bank of Linton, by whom the drafts were paid and carried against Doe's account as a bill of exchange.

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I think the bank also held the B/L covering 3 B/C shipped from Cordele March 3rd, but I am not sure as to that point.

From the above it will be noted that on March 17th Doe had only 60 bales at Graham.

11. *Custom or Understanding Between Roe and Doe:*

There was no memorandum or definite understanding between Roe and Doe as to how these sales should be handled, but the usual procedure was as follows:

As soon as Doe's cotton was unloaded at compress at Graham, samples were drawn by the compress and sent to his Linton office, and when received there Doe would notify Mr. Harrison (Roe's take-up man) at Oklahoma City; then Harrison would come to Linton and go over the samples with Doe, class them, figure up the weights, (taking same from the compress weight sheets sent Doe with the samples), and price of the cotton, for which Harrison would give Doe a draft on Roe, with the necessary shipping instructions; Doe would then give shipping order to compress and when cotton was loaded and consigned as per shipping orders given by Harrison, Doe would obtain the B/L, attach the draft to same, and deposit for collection in the usual course. The invoices were made out on Roe's forms at the time Harrison and Jones classed the samples.

12. *Roe Reported Purchase to His Underwriters:*

On their insurance report No. 707, mailed on the evening of March 17th, Roe reported the purchase of 176 B/C bought at interior points since the previous report, and stated this 104 B/C were included therein.

13. *No Confirmation of Sale Given:*

It is customary for the purchaser to make out a confirmation of all purchases, mailing original and duplicate to the seller, such confirmation being in the following general form:

"Dear Sir: We hereby confirm having this day purchased from you by 'phone 50 B/C @ 12c per lb. basis Middling, White, other grades at differences stated below. Cotton to be ready for delivery within ten days unless otherwise understood and noted hereon. This contract to be governed by the rules of the Oklahoma State Cotton Exchange. Please confirm this transaction by signing attached counterpart which please detach and mail to us immediately."

We cannot say it is the invariable custom to exchange these confirmations, especially where the sale is made by wire, and in this case no such confirmation was sent.

14. *Conclusions:*

It would appear from the above that there is nothing in the telegrams passed between the buyer and seller to so designate the 104 bales purchased that the purchaser could enforce delivery or obtain possession of the 104 bales at Graham if Doe had died or become bankrupt. Roe states he did not know where this cotton was located, until March 22nd, when Mr. Harrison went to Linton for the purpose of taking it up.

This cotton was certainly not in deliverable condition. It was not separated or segregated from other cotton, and it would therefore appear—under a strict interpretation of the law—that the property had not passed from seller to buyer. It was therefore at Doe's risk and his underwriters are liable for the loss.

15. *Sale of 50 Bales to Frank Brown:*

(a) On the morning of March 21st, 1916, the day on which the cotton involved was burned at Graham, Frank Brown called at Doe's office in Linton and was there shown the samples of 50 B/C which Doe offered to sell him.

(b) Brown went over the samples and agreed to buy the 50 B/C at a round figure of 9.5c per pound.

(c) Brown took one of his business cards and wrote thereon:

"50 @ 9½ fob

Ship Frisco

Patch 2 lb. per bale,"

and handed same to Doe, who immediately made out the necessary invoices showing compress tag numbers and weights which he obtained from the compress weight sheets that had been sent him with the samples. Brown gave him verbal shipping instructions and said how the bales should be patched and marked.

(d) Brown handed him a bank draft, that is, blank with the exception that it had the name of the drawee stamped thereon, "Frank Brown, Memphis, Tennessee," and instructed Doe to consign the cotton as per orders, fill out the draft for the amount of invoice and attach B/Ls to same. Brown left the office and Doe immediately proceeded to make out the necessary shipping orders and had completed both drafts and made out shipping order for one lot of 25 B/C when he was informed the compress at Graham was burning.

(e) On leaving Doe's office, and before he learned of the fire, Brown wired his Memphis office, the message being filed at Linton, Oklahoma, 1:45 p. m., March 21st, 1916, reading as follows:
"Frank Brown, Memphis, Tenn.

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"Bought from Smith here forty two nine three eights Doe fifty at half Morrison Altus one forty nine at quarter. Will reach home after dinner Wednesday evening. Frank Brown—223 PM."

(f) As the fire at Graham, Oklahoma, occurred at 12:30 p. m., there is little doubt that neither Brown nor Doe had learned of the fire when this message was sent.

(g) Brown's Memphis Office reported to their Underwriters the purchase of 50 B/C in their daily report No. 58 mailed their brokers Messrs. Harding & Company, on March 21st.

(h) After learning of the fire, Brown returned to Doe's office and there was some conversation as to who owned the cotton at the time it burned and as to whose Underwriters should pay for it, and both Doe and Brown reported the loss to their respective Underwriters.

(i) Under date of March 22nd, 1916, Brown wrote Doe, Linton, Okla., as follows:

"Memphis, Tenn., March 22, 1916.

"Mr. John Doe, Linton, Okla.

"Dear Sir: We confirm having purchased from you 50 bales at 9½c round on the 21st instant, and having later canceled the purchase with you on account of the probability of the cotton having been destroyed in the Graham fire.

"Concerning the matter of insurance on this 50 bales, we have wired you today that our policy provides that invoice showing the tag numbers or other specific identification must be in our hands or must be mailed to us prior to the occurrence of fire in order for the cotton to come under our insurance. In view of the fact that we did not pay for the cotton and invoice was not in our hands and had not been mailed to us, this 50 bales was not at our risk when destroyed.

Yours very truly, (Signed) Frank Brown."

16. *Memorandum of Purchase Made by Brown:*

In my original report I stated that Brown had not initialed or subscribed any memorandum of this purchase as required by the Oklahoma statutes, which statement I made on the strength of Brown's having answered my interrogatory as follows:

Did you sign or initial or subscribe in any manner any invoice, memoranda or other writing concerning this purchase before the fire?

To which he answered: "No."

Subsequent to making that report, the following interrogatory was put to John Doe:

Did Brown attach his signature, initial or in any way "subscribe" any invoice, memoranda or documents concerning this sale?"

To which he answered:

Brown handed me his business card with a notation of number of bales and prices. I think I gave this card to Mr. Mason, but it may be somewhere in my files.

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Doe's answer did not reach me until the 10th of July, and I then asked him to make search for the card, and he subsequently sent same to me, (see para. 15 above) stating he had found it in the pocket of an old coat he was wearing at the time.

17. *Documents Covering 50 B/C Sold Brown:*

25 B/C were shipped from Cordele, Okla., March 13, 1916, Morrison Gins under Frisco B/L D-93 O/N Doe, Graham, Oklahoma, and were received and unloaded at compress on March 20, 1916. The Interstate Compress Company had issued their compress receipts Nos. 31717-31741 and handed same to the Frisco Agent for delivery to Doe upon surrender of the B/L. Compress Company had, following their usual custom, sampled and weighed the cotton as unloaded and sent the samples and weight sheets to Doe at Linton. The cotton was unloaded under the supervision of the Western Weighing & Inspection Bureau, received and sampled by the compress as agent for Doe, which I am inclined to believe relieves the carrier from liability irrespective of the bills of lading not having been surrendered and the cotton having burned within forty-eight hours of arrival.

25 B/C were shipped from Dill City, Okla., March 14th, 1916, under Rock Island B/L D-9 by J. T. Hall, consigned to J. T. Hall, Graham, Oklahoma, John Doe. This cotton was received and unloaded at compress on March 18, 1916, on the same conditions as above, sampled, weighed, and samples and weight sheets mailed to Doe at Linton. Compress Company issued its receipts Nos. 31497 to 31521 and handed same to the Rock Island Agent for delivery to Doe on surrender of B/L.

On March 21, 1916, these B/Ls, with the drafts attached, were held by the Bank of Linton who had paid the drafts for account of John Doe and were holding them in the usual manner as bills of exchange. The banks hold them under that designation so as not to show the enormous overdrafts that would otherwise appear in these cotton accounts.

18. *Conclusions as to Frank Brown's Purchase:*

In this case, the purchaser had examined samples from the specific bales offered for sale, and had contracted to buy same at the agreed price of 9.5c. The invoices had been made out, designating the cotton sold by marks and numbers, and nothing remained for the vendor to do to complete the sale or delivery, his giving the

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necessary shipping instructions to the compress being merely an act of courtesy extended by the vendor to the vendee. Both the vendor and vendee had performed all the acts required of them to complete the sale if we construe the memorandum made by Frank Brown on one of his business cards as being such note or memorandum in writing as must be subscribed by the purchaser. Personally, I am inclined to think the Courts would so construe it and thus hold title had passed to Frank Brown before the cotton was destroyed. I therefore consider these 50 B/C were at Frank Brown's risk and his Underwriters are liable therefor.

There is a question in this last case as to whether vendor had complied with clause 2, Form 300, which requires "its location with its specific marks and numbers be stated in contract of purchase, or in confirmation thereof furnished to the purchaser immediately thereafter and before known or supposed loss". It may be claimed this calls for a *written* statement giving location and marks or numbers, but it does not so read and as the policy states it is to "cover during the whole time cotton is at risk of assured" and that liability is to "commence from the moment cotton has become the property and absolutely at his risk", I think the Court would hold it under cover of Brown's policy as the property right undoubtedly passed to him, and it became at his risk when he agreed on the price and handed Doe his card with the memorandum thereon confirming the purchase. If Doe had brought action against Brown in Oklahoma he would undoubtedly have obtained verdict for the agreed purchase price.

POLICY FORMS (See Appendix as Numbered Below)

Let us first consider the "Specific Forms" i. e. the forms attached to the Standard Fire Policies issued for such amounts as may be given in the policy for the premium therein stated.

Form No. 8-C, "General Floater." This form is designed to cover the Assured's cotton (and that coming under the Commission Clause) wherever it may be located in the designated city or town exempting only in such buildings as may be specifically excluded in the form.

Form No. 9-C, "Limited Floater." This form is designed to cover as above only in such buildings as are specifically described and while in transit through streets between same.

These two floater forms carry the full Co-Insurance Clauses and have been the cause of many controversies and some litigation

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through local or special agents who did not fully understand their construction, and who gave the Assured an erroneous explanation of their application. This feature will no doubt be fully covered in lectures on the Co-Insurance and Average Clause and therefore it is not necessary to give examples here. But I will take the liberty of saying that in my judgment the Average Clause should be substituted for the Co-Insurance Clause in all those forms.

Another clause which I think should be amended is the one referring to cotton under bills of lading, for the Standard Bill of Lading contains this clause:

"Section 10. Any carrier or party liable on account of any loss or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance."

Form No. 10-B, "Open Warehouse and/or Compress," is designed for insuring cotton in open warehouses and warrants that no cotton shall be left in court at night or Sunday, and that a clear space of eight feet shall at all times be maintained between the overhanging roof or apron of warehouse building and the cotton in open court.

Form No. 10-C, "Close Warehouse and/or Compress," is designed for insuring cotton in "close" warehouses.

All the above forms are designed to cover cotton in the one building or one location specified in the form, in which particular they differ from the following "Floater Forms":

In considering the above forms, 10-B and 10-C, it is well to explain the meaning of "Open" and "Close" warehouses.

A "Close" warehouse is a building with walls on all sides and no openings that are not closed with doors or windows in the usual manner.

An "Open" warehouse is a building with open arches, or other unclosed openings in its walls. Often these open warehouses are built around two or more sides of an open court with open arches facing the court.

Form No. 11-E, "Baled Cotton, Seed Cotton and Cotton Seed on Ginnery Premises," is, as the form shows, intended only for insuring cotton in the gins. This form carries the full Co-Insurance Clause on the first item and the 80% Clause on the second item.

Form No. 12, "Cotton Form for Sprinklered Cotton Warehouses," is designated for insuring cotton in sprinklered warehouses specified in the form.

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This form warrants that not more than a stated number of bales shall be stored in any one compartment, and that it shall not be piled over a stated number of bales deep on sides, i. e., that the bales shall not be tiered above a given height.

The form also warrants that no cotton shall be left in yards or courts adjoining warehouse between 8 p. m. and 6 a. m. It should be noted that this form does not cover cotton in yards or courts or any where outside of the building described.

Form No. 12-A, "Cotton Form for Sprinklered Cotton Warehouses (In Connection with Platforms, Courts and Yards)", is designed for insuring cotton on platforms and in courts and yards adjacent to sprinklered warehouses described in Form No. 12 (next above). It covers only between the hours of 6 a. m. and 8 p. m., which limitation is necessitated by the fact that both forms require the courts and yards to be clear of cotton between 8 p. m and 6 a. m

Form No. 12-B, "Cotton in Bales on Plantation or in Country (With One Hundred Feet Clear Space Clause)", is for use in insuring baled cotton on the plantation or in the country, as at the gin- nery, etc. It carries the One Hundred Feet Clear Space Clause, requiring a 100 foot clear space to be maintained between the insured cotton and any gin or other special hazard. This form also carries the Sample and Weight Clause, requiring Assured to keep and produce a sample of the cotton from, and a record of the weight of, each bale insured.

This form also contains a Loss Payable Clause, but unlike Form No. 13-A it does not permit the Assured to make the loss payable to the Assured's order by his own endorsement without the Insurer's consent.

Form No. 13-A, "Cotton Forms—Marks and Numbers (Form for Insuring by Marks, Numbers and Amount Per Bale)", is the most restricted or specific cover, and does not carry or require the Co-Insurance Clause, as it covers the stated amount on each of the specified bales and cannot be extended to cover on any cotton other than the bales therein specified by marks and numbers. This form carries a Loss Payable Clause as follows:

"The property covered by this policy may be pledged without notice as collateral security for loans or advances, but loss, if any, under this policy shall be adjusted with the Assured, and is payable only to the Assured or their order endorsed on or attached to this policy."

Before paying loss under such policy it should be carefully examined to ascertain whether there are any pledges or collateral in-

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terest endorsed thereon, and if such is the case, drafts in payment should be drawn to order of all parties at interest, as shown by such endorsements.

Most of the cotton in this country is insured under what are known as open reporting policies. This method of writing insurance is not by any means a new idea. I have seen such policies that were written a hundred years ago and have adjusted losses under one policy issued in 1868 which, owing to a change in the firm, was written in place of one issued by the same Underwriters through the same brokers to the same Assured in 1835, and I have yet to see an improvement on that old form. Similar policies are now coming into general use on other classes of merchandise, many of them evidently prepared by men who have had little or no experience with this class of business, otherwise they would follow the wording of the older English forms instead of producing some of the more lengthy though ludicrously ambiguous documents I have seen during the last few years.

It has never been my misfortune to come in contact with any line of insurance that requires such a general knowledge of the banking, transportation and warehouse business and the laws and customs bearing on the selling of merchandise as is necessary to adjust intelligently losses under these policies.

For the last fifteen or twenty years I have worked harder and spent more time studying it than I have ever devoted to any other branch of the business, yet have never felt that I have mastered it and am always finding new problems; and the laws, customs and methods change so frequently that I am forced to continue studying it in order to keep abreast of the times. It is the only branch of the business that requires the adjuster to be thoroughly familiar with various and complicated methods of computing the premiums to ascertain whether the Assured has properly reported previous purchases made under the same conditions as the property on which claim is made.

When I am working on these cotton losses, the Assured often ask me if I cannot find someone who can handle their financial statements, confirmations, and daily report work, for which they offer salaries of from \$2,500 up. I know of at least one lady who is drawing more than three times that salary, and several who are drawing over \$2,500. The demand always exceeds the supply, so for a young man or woman with the necessary ability and education, who is

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studiously inclined and not afraid of work—for it requires many months of arduous study to master the necessary details—this branch of the business offers greater inducements and better financial returns than any that I know of.

"Per Bale" or "Buyer's Transit" Forms of Open Reporting Policies. Form 300, *"Buyers Transit,"* is the one in current use by the Cotton Insurance Association and is attached to the Standard Fire Insurance Policy, being subject to all its conditions that are not modified or abrogated by the conditions of the form itself.

"Form M" is the *"Cotton Rider"* in general use by the Marine Underwriters and is attached to the Marine *"Cargo Policy."*

Both these are reporting forms of open policies and, although there is some slight difference in the wording, both cover on cotton in bales, that is, purchased by the Assured or for their account, attaching from the moment the cotton becomes the property of the Assured or legally at their risk. Both provide in effect that no cotton shall be covered prior to actual delivery to Assured, unless (Form 300) "its location with its specific marks and numbers be stated in the contract of purchase, or in a confirmation thereof furnished to the purchaser immediately thereafter and before known or supposed loss, or unless cotton is reported to this Company at the time of the contract to purchase," or unless (Form M) "specifically identified by marks or numbers or other designation in possession of Assured or mailed to the Assured prior to loss."

Form M does not say that no cotton shall be covered unless reported to the company at time of purchase, but in Clause 16 the Assured warrants that all purchases shall be reported daily, which would have much the same effect. The wording "or for their account" following the words "purchased by the Assured" in both forms, and the wording "other designation" in Form M, is very broad and often covers a multitude of sins. If this wording were omitted the adjuster's lot would be a much happier one, as we shall explain later on. Both forms require the Assured to keep a record of purchases, sales, and shipments, and to make daily reports of all cotton purchased, sold or shipped. The premiums on these policies are computed from the Daily Reports on an agreed schedule of rates. As a matter of fact, the Assured is required to report all cotton purchased and subsequently to report it as it is received, sold and shipped. There is a distinct difference between cotton purchased and cotton received which will be readily understood by re-

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ferring to the Daily Report Form E, the first section of which requires the Assured to report all cotton purchased "for immediate or future delivery." For example, if the Assured on September 5th purchases 1,000 B/C to be delivered between October 5th and October 10th, he is required to report that purchase in the first section of his Daily Report for September 5th, but the cotton does not come at his risk, and he is not charged any premium thereon, until delivery is made and he reports it as being received in Column 4 of the second section of his report. It would simplify matters if the Assured were only required to report the cotton as it was received or otherwise came at his risk, instead of being also required to report it as soon as he agrees to purchase it; but the latter requirement gives an additional check or proof on the reports.

Both forms contain clauses excluding liability for cotton in possession of any carrier or other bailee who may be liable for loss thereto, and clauses warranting the Assured will not relieve any carrier or other bailee from any statutory or common law liability or duty. The Underwriters agree (usually evidenced by letter from insuring company to Assured) that where they deny liability under the above clause for loss on cotton in possession of carrier or other bailee for which they would otherwise be liable, they will advance the amount of claim to Assured as a loan without interest, the repayment thereof to be conditional upon, and only to the extent of, any recovery from the carrier or bailee, the Underwriters agreeing to assume all costs and expenses of making the recovery. Both forms authorize the Assured to issue and countersign certificates insuring shipments to final destination, the cover under Form 300, however, excluding liability on waterbourne cotton, limits these certificates to railroad shipments within the United States. The marine form contains no such limitations and covers the perils of the sea and the "risk of damage or destruction by fire, tidal waves, or overflowing rivers, while the cotton is in process of and/or awaiting shipment or sale . . . in the United States."

These certificates are negotiable and when properly endorsed and delivered have all the effect of separate valued policies payable to the holder on satisfactory proof of loss. They are usually issued for invoice value of the cotton (i. e. the amount for which it is sold) plus ten percent, plus freight and the premium on the amount of the certificate. This you will note is an exceptionally liberal contract and the power to issue and countersign it confers

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an unusual authority on the Assured. The value stated in the certificates cannot be questioned by the Underwriters except on the ground of fraud.

Both forms provide that all losses arising before certificates are issued, shall be payable to banks, banker, or other parties, as interest may appear, provided the Underwriters receive written notice of such interest within ten days after loss. On the Assured's request the Underwriters will issue letters to such banks as the Assured designates, certifying they have issued their policy covering all purchases of cotton made by the Assured and citing the above clause. Under these open policy forms it is customary to advance the Assured from seventy-five to ninety percent of the loss as soon as the approximate amount of the loss is ascertained, and, as these advances are generally made within the ten day limitation, the Underwriters require the written guarantee of some responsible bank (to whom the money will be paid), guaranteeing them against all claims of other parties alleging any interest in the specified cotton. A copy of this form is given in the appendix under "Bank Guarantee." The marine form also covers the risk of "country damage," but as that is not a fire hazard it will not be treated in this paper.

Both forms provide (See Clause 15, Form 300 and Clause 12, Form M) that when loss occurs before certificates have been issued the basis of settlement shall be (Form 300) the actual cash value and (Form M) the actual market value, at time and place of loss.

Form 300 carries the full average clause (see Clause 10) and gives permission for other insurance. Form M (See Clause 10) prohibits the Assured excluding any cotton purchased from cover of the policy or insuring same elsewhere.

Form 300 under Clause 11 and Form M under Clause 19 place a limit on their liability for loss by any one fire, but these limits are usually placed at such a high figure, from \$100,000 to \$500,000, that I have never known them to effect the settlement; in fact, some marine policies are issued without any such limit.

If the Underwriters insisted on "Daily Reports" being made every day including all the details called for, it would be a comparatively easy matter to check up the Assured's records and determine if he had been reporting all cotton that actually came under cover of his policy, because he could not make such reports without keeping some permanent record in his own office, but unfortunately that detail is not insisted on. Many reports show only total daily receipts

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and shipments, or possibly are divided as to location between those points where the Assured maintains a branch office, each branch office probably buying in a dozen different towns. Some Companies permit Assured to make weekly reports and some even accept monthly reports. Originally these per bale policies were issued only to the larger, long established exporting firms of recognized responsibility and integrity, but modern competitive methods of obtaining business are placing them in the hands of men of a very different stamp.

Many adjusters take the position that it is no part of their duty to check up the Assured's records under these per bale policies to ascertain whether or not he has reported and paid premium on all cotton for which he is making claim. They assume that if the assured does not claim to have had a larger number of bales on hand than is shown by his last daily report, they are warranted in accepting his statement that all cotton for which he produces receipts was at his risk at time of fire, and paying him therefor. I have always inclined to the opposite view, believing that as the reporting of all cotton is an essential condition of the policy contract, the adjuster should make such investigation as may be necessary to determine whether or not the contract has been violated by non-compliance with that requirement. Furthermore such an audit is necessary in many cases to determine whether or not the cotton for which claim is made was actually at the Assured's risk at time of loss. I am seldom willing to accept the mere production of warehouse receipts as satisfactory or conclusive evidence of ownership. This sometimes requires a complete audit of the Assured's books and records from commencement of the season to the date of loss, and as a rule the fewer the records kept by the Assured the greater difficulty and time required in making the audit. Those who have not come into intimate contact with this work will find it difficult to understand how loosely some cotton buyers run their business, or believe even that it is possible for a man to handle 5,000 bales of cotton a month, borrowing the full market value of that cotton from the banks, and yet have no records in his office showing when, where or from whom he bought each specific lot of cotton and when and to whom he sold it; but I have known of many such cases.

The Assured's integrity may be above all question and his accounting system and records such as will enable you to check up his daily reports and obtain a satisfactory verification of same with very little work and without going to outside sources, but unfortunately

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we encounter some Assureds with whom such is not the case. I have found claimants whose memory was so poor that they forgot to disclose bank accounts through which they had handled hundreds of bales of unreported cotton and upon which they would never have paid any premiums if we had not discovered such accounts by inquiries made outside of the Assured's and Agent's offices.

This failure to check the Assured's records further than to count and examine the Warehouse Receipts covering cotton he claims to have lost has undoubtedly cost Insurers many thousands, for when the Assured has any friends among the local merchants or planters who may have lost cotton upon which they had no insurance, he can very easily include their Warehouse Receipts with his own and thus collect from his Insurers for cotton upon which no premium had or ever would have been paid. The same fraud is often perpetrated under specific policies, where, for instance, John Doe has more insurance than cotton and Richard Roe more cotton than insurance, Roe merely turns over some of his receipts to Doe, who presents them to the adjuster as his own, collects, and then pays his friend Roe.

It is sometimes impossible to discover or prevent these frauds even when we know they are being perpetrated. I had one very amusing case, where there was an honest old man running a cotton warehouse from which he was issuing what we term "Insured" and "Uninsured" receipts; that is, he was agreeing, where the owners paid certain charges, to insure the cotton for them, in such cases issuing receipts stamped "Insured." He was carrying \$10,000 insurance in his own name, with the usual Commission Clause, to cover cotton under such "Insured" receipts. At time of fire there were approximately 2,000 B/C in the warehouse, most of which was insured by the owners, there being less than \$5,000 worth of cotton under the "Insured" receipts that was covered by the warehouseman's \$10,000 policy. There were, however, several planters and small merchants having cotton stored in the warehouse, upon which they had no insurance. One of these men who had refused to pay the difference between the "Insured" and "Uninsured" charges, and who, therefore, held receipts that were not stamped "Insured," learning that the warehouseman had sufficient insurance to cover all the uninsured cotton, took his ten receipts to him requesting that they be stamped "Insured," explaining that such would merely be a friendly act on the warehouseman's part and would enable the merchant to recover for this cotton, which otherwise would be a total

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loss to him. The warehouseman could have complied with this request without any fear of detection, as there was nothing in the warehouse records to indicate which or when receipts were stamped "Insured," but, being honest, he refused to be a party to such fraud; and the merchant went around town bemoaning his loss and criticising the warehouseman for refusing to protect him. A day or two later someone asked this same merchant how much cotton he had lost and whether it was insured, to which he replied that he had ten bales in the warehouse which he had not insured, but had later arranged to have it taken care of, so that he would not lose anything.

The above facts being reported to me before any of the losses were closed, I required every claimant to produce all available records, which I checked up most carefully, but I was unable to locate this particular merchant's cotton. I then submitted affidavits to every claimant which required them to state on oath that at time of fire they held all the receipts they had presented and that the cotton covered thereby was solely at their risk. Not a single claimant hesitated to execute these affidavits. My suspicions narrowed down to two or three claimants, but I was unable to obtain evidence warranting my refusing to pay any of the claims, and finally gave up the fight, though I am still satisfied that we paid someone for these ten bales of uninsured cotton.

I recall one fire where an Assured, who had 500 odd bales destroyed, was buying and handling cotton in eight or ten different towns. His last daily report mailed prior to fire showed that, including cotton at all points, he had only 250 B/C on hand. A report mailed the day of the fire (presumably after the fire occurred) increased the cotton on hand to 650 B/C. On my asking him where he obtained the data from which he made up this last daily report, he replied that he only kept a pencil memorandum of the cotton bought and sold from day to day, destroying same as soon as the report was made, and he insisted that he had no books or records in the office from which a statement could be made up showing the total number of bales he had handled that season. After two or three hours' controversy he commenced a search of the office, in which I assisted. This resulted in our finding some invoices, etc., from which I made up a rough statement showing he had something like 1,100 B/C on hand at different points on day of the fire, at which time his daily reports showed he had only 250 bales.

In answer to a request for his bank books he handed us two,

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but I subsequently discovered he had another bank account; and he was finally forced to pay premiums on something over 2,000 B/C which he had not reported.

Where conditions are found to be such as to make an audit of the accounts seem expedient my own method of procedure is as follows:

I first endeavor to ascertain from the Assured how many bales he had on hand and where same were located at the commencement of the season. This part of the Assured's statement can usually be verified by checking the records of the various compresses and warehouses. I then ascertain with what banks or merchants he has kept any accounts or with, or through, whom he has handled any of his cotton business, and obtain all his cancelled checks, stub books and bank statements and likewise all original purchase invoices he has in his possession and all possible details of his sales and copies of bills of lading I can find among his records. I make him give me an order on the banks (usually having same addressed to any bank or banker) with whom he admits having had an account, requesting them to permit me to examine and audit all transactions recorded on their books in which he had any interest. Then I call on the banks and make a transcript of the Assured's account as it stands on the bank's books, and if the bank is interested to any large amount in comparison to the Assured's known financial resources, I verify the entries by checking them through to the controlling accounts on the bank's books. When I have secured all obtainable details I make up a statement by first listing, by marks or numbers, the bales on hand August 1st or September 1st, according to the time the Assured commences his season, which is usually September 1st; then, using specially prepared "cut leaf" sheets that can be extended for as many columns as may be required as the work progresses, I continue the statement from day to day, showing the number of bales (with marks or numbers) received, that is, coming at the risk of Assured, at each warehouse or place, and the same information covering sales and shipments, giving marks or numbers to identify each bale. I also number the purchase and sales invoices and drafts and bills of lading and so indicate them on the statement that the movement of any bale can be traced to either document, thus the controlling columns of the statement show the number of bales on hand at each location at the beginning of each day, the number received and shipped, and on hand at close of day, as the Daily Report Form provides, with the added detail as to marks or numbers of

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each bale identified by number to its invoice, bill of lading and drafts. The identical baies for which claim is made can readily be checked to this completed statement to ascertain if they were at the risk of the Assured and had been duly reported as the policy requires. If the completed statement checks out all the deposits and payments shown by the bank records we may assume it is correct, if not it may be necessary to examine the railroad company's records to get a further check on shipments. I recall two or three instances when we found through checking up the railroad's records that some carloads of cotton had been shipped out weeks before the fire, yet the banks held the warehouse receipts covering this same cotton, which was also shown to be on hand at time of fire by both the Assured's and warehouseman's records. It requires specially trained men for this auditing work, at which the ordinary bookkeeper or accountant is of very little use without competent supervision, so it is often an expensive procedure. But I have found that when intelligently done it has always resulted in a saving to the underwriters of many times the cost of the work, either by reduction of loss or by collection of additional premium on unreported cotton.

Until a few years ago the Underwriters had no systematic method of auditing these accounts to determine whether they were receiving premiums on all cotton that came under cover of their reporting policies, but after their attention was called to some flagrant cases where thousands of bales of cotton had not been reported a regular system of auditing was provided which has resulted in their collecting hundreds of thousands of dollars in premiums which under the old method they would not have received. I feel sure that some of our friends who are insuring other classes of merchandise under similar policies will eventually have to adopt some such system.

OWNERSHIP AND LIABILITY UNDER VARIOUS CONDITIONS AND METHOD OF ADJUSTING A TYPICAL COTTON LOSS.

As a fair example of the average large cotton loss, I will cite that of a compress in one of the Southern States in which the following facts developed:

The building was approximately 250x1200 ft., divided by a brick fire-wall into three sections. Fire originated in and destroyed one warehouse section and cotton therein, but was stopped by the

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fire-wall, and there was no damage to the other warehouse section or to the section containing the boilers and compress machinery, or to the cotton therein.

The compress records showed there were approximately 20,000 bales in the three sections, but carried no data showing how many, or which of the 20,000 were in the burned section. We found by rough count that there were approximately 12,000 bales saved undamaged, therefore approximately 8,000 bales had been destroyed. The buildings and machinery were insured specifically for \$75,000. The cotton was worth on an average of \$80 per bale, giving a total value of \$1,600,000 for the 20,000 bales involved.

It was alleged by some interested parties that fire was caused by sparks thrown from locomotive operated by a railroad which carried spark hazard insurance in an Association that also insured about half a million dollars worth of the burned cotton for different owners.

The insurance involved, other than the \$75,000 on buildings and machinery, was approximately as follows:

(a) The railroad, alleged to have caused the fire, carried approximately \$500,000 spark hazard insurance, or more strictly speaking, 50 percent of its liability up to \$575,000 for any one fire; that is, insuring it against loss through its liability for negligently caused fires.

(b) The Compress Company carried Specific Fire Policies aggregating \$50,000, covering on cotton with the usual Commission Clause, the purpose being to cover such cotton as they had agreed to insure. All receipts, however, carried the usual legend: "Risk of fire excepted"—there was no difference in the wording of receipts for cotton they had agreed to insure and receipts for cotton they had not agreed to insure—and in most cases they had only a verbal agreement with such customers as they had agreed to insure.

(c) There were three factors who held Specific Fire Policies aggregating \$50,000, \$100,000, and \$215,000, respectively.

(d) Three planters held specific Fire Policies of \$3,000, \$2,000, and \$12,000.

(e) There were 16 buyers holding Open Reporting Policies with limits of from \$10,000 to \$400,000, for loss by any one fire, besides which one buyer held specific Fire Policies for \$50,000, his Marine Policy carrying an endorsement making it cover only on the excess of value in any one location above the specific insurance thereon.

(f) Three different railroads had side tracks at the press, each carrying policies covering their "common carriers' liability" for loss on cotton in their custody.

(g) One bank had taken out Specific Fire Insurance in the name of the owner of some cotton, warehouse receipts for which were held by the bank as collateral to a loan it had made to another bank. The owner of this cotton, when he placed it on storage with the Compress Company, had arranged for the Compress Company to bring it under cover of their policies. He subsequently borrowed some money from his local bank, hypothecating the warehouse receipts as collateral, which

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bank in turn used these receipts as collateral to a loan they obtained from another bank, and this last bank, without any authority and without conferring with the owner of the cotton, took out insurance in the owner's name, with loss, if any, payable to it. The Compress Company duly made claim against their insurers for this cotton, and the first information they or the owner had of the bank's action in insuring same was when they were so advised by the adjuster. He promptly denied liability under the policies issued to the bank.

Some of the cotton involved had been sold to New England Mills, f. o. b. Compress, pressed, loaded, and B/Ls issued, and was therefore at the buyers' risk, and they would make claims under their B/Ls against the Railroad Company, who were liable as carriers, the railroad in turn passing same on to their Insurers.

Some of this cotton had been sold f. o. b. New York, had been pressed, loaded, B/Ls secured, and specific insurance certificates written thereon for the face of invoice, plus 10 percent. In these cases the Insurers advanced the face of the certificates and instructed the Assured to make claim against the railroad under its B/Ls, the railroad, in due course, passing the claim on to their Insurers.

Some cotton was in transit, that is, it had been shipped from some point, say, to New England, under through B/Ls and under the carrier's orders had unloaded at compress to be "compressed" in transit. The railroad under whose B/Ls this cotton was moving was liable for the loss.

Some of the cotton had been consigned from other points to local buyers, and the cars had only been partially unloaded at the time of fire.

Some of it had been sold before the fire and receipts surrendered to the compress with Turn Out Order, but the buyer had not sampled or accepted the purchase, thus raising the question of delivery and the fact of whether it was at the buyer's or seller's risk when destroyed.

Most of the cotton was what is known as Long Staple, for which no Exchange quotations are published, and such quotations as one can find are of little assistance to the adjuster in determining prices. One adjuster represented a large majority of the insurance involved, but nevertheless there were ten or twelve Special Agents engaged on the loss.

What was the proper course to pursue in making this adjustment? With all humility and much more timidity than may be apparent to the casual observer, I suggest the following:

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1st. See that some responsible man of known ability and experience in extinguishing cotton fires is placed in charge of the salvage to handle same "For Account of Whom It May Concern," with instructions to extinguish the fire and do all that may be necessary to protect the salvage, but not to sell same until specifically ordered to do so. Experience has taught us that it is seldom there is any intelligent effort made to extinguish the fire or protect the salvage before the adjusters or their representatives reach the ground. If the fire occurs in a town having a fire department, after the department has extinguished the burning buildings, they usually play water on the burning cotton until no fire is visible, then they take no further interest in the matter. It is almost impossible to extinguish the fire in a bale of cotton by simply pouring water on it. There are authenticated cases where a burning bale has been thrown into the water and kept immersed for a week, after which it has been taken out, left on the deck, and 48 hours afterwards found to be on fire again in such a manner as to make it evident the original fire was not extinguished. We can recall many fires where a delay of 24 hours in handling the salvage has resulted in increasing the loss many thousands of dollars; in some instances over \$50,000. A few hours' delay in placing a competent man in charge of the damaged cotton may prove so costly that the adjuster cannot afford to wait until he hears from all companies, so as soon as he is warranted in assuming he will have a reasonable representation he should wire the nearest available man to proceed immediately to the scene of the loss and offer his services as a representative of the underwriters, to the compress manager, to assist (really to take charge) in extinguishing the fire and protecting the salvage.

2nd. When the adjuster arrives he should immediately interview the compress officials, obtaining the names of the managers, superintendent and his assistants. Make memo of the watch clock and fire protection records.

3rd. Investigate the cause of fire. If there is a probability of its having been caused by sparks from locomotive, put some experienced investigator at work immediately with instructions to secure affidavits from all available witnesses. Obtain details of all passing trains from which sparks may have been thrown; that is, train number; type and number of engine; names of crews; number of cars, loaded and empty; exact time of passing; obtain copies of reports made by conductor of train, roadmaster, section foreman, and railroad agent. This, of course, requires some secret service

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work, but the man who knows how can usually get it. Ascertain the railroad's rules covering inspection of locomotives and spark arresters, and at what shops and under whose supervision said inspections are made, and what record is kept of same. All of this requires a thorough knowledge of railroad methods and routine. Arrangements should be made to obtain plats of the scene of fire, showing all railroad tracks with their grades, curves, and crossings. The investigator should drive up and down the tracks for twenty or thirty miles, each side of the town, interviewing residents to ascertain if the railroad has set other fires in the vicinity, either to grass on the right-of-way or other property, and if so, obtain details, in the form of affidavits if possible.

4th. Have an inventory made of the undamaged cotton. This should be made by two sets of men, one representing the Insurers and the other the warehouseman. They should check against one another, and thus prove their work as they proceed. Incidentally, this is not so easy a matter as one might think. Few adjusters who have had no training or practice in inventorying or tallying work can go down to a dock or open platform containing 1,000 or more bales of cotton, sacks of grain, or cases of merchandise, and count them with any reasonable accuracy; that is to say, if they count it three times there will be an average difference of 10 to 25 units between the three counts. Any one who doubts this statement can easily put himself to the test. This inventory of the saved cotton must of course show the Compress Tag number of each bale, which number will correspond with the receipt originally issued to the owner when the bale was received at the compress. It should also show the Owner's Tag number, if it is tagged. This inventory as taken will not show these numbers in the numerical order into which they must afterwards be thrown by making a second list for the purpose of accurate and rapid checking to the individual accounts. The compress should not permit any cotton to be shipped or removed until this inventory is completed.

5th. Make such audit of the compress records as may be necessary to obtain these figures: (A) Total bales on hand at the beginning of the season. (B) Total subsequently received by rail. (C) Total subsequently received by wagon. (The sum of A, B, and C gives you D—Total Receipts.) (E) Total shipments by rail. (F) Total deliveries by wagon (the sum of E and F gives G—Total Shipments). D minus G gives H—total bales on hand at the time of fire. The accuracy of all these figures except the wagon receipts

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and deliveries should be subsequently verified by checking and proving same to the Railroad Company's records. This may necessitate making up a statement showing receipts and shipments for each day from the beginning of the season, and is no easy task; but remember we are dealing with units worth from \$60 up. I have had several cases when our checking the Railroad Company's records to prove receipts and shipments by compress resulted in our finding some cotton (usually carload lots) had been shipped before the fire which was shown by the compress records as being on hand and for which the Assured made claim, producing the compress receipts to support it. Some of these cases were due to errors made by incompetent or careless clerks with no intention to defraud, and some of them due to what we will call convenient oversights.

6th. Make a transcript of all open entries in the compress bale book, or such other record as the compress keeps; the sum of these open entries should equal H, the Total Bales on Hand, as shown by the method followed in paragraph 5. This transcript should carry all the information shown on the records, such as receipt number, date of issue, and to whom issued.

7th. A transcript of all Clearances or Shipping Orders in process of execution at the time of fire, with the receipt numbers and bale marks; and transcript of all loading notices and receipts for outbound cars on track.

8th. Copy of all incoming and outgoing B/Ls covering cotton on hand under B/L at time of fire.

9th. List of all bales which the Compress Company or warehouseman had agreed to insure, giving the receipt number, date of issue, to whom issued, when, with whom, and how agreement to insure was made, and the charge to be made therefor. All this data can be shown on the transcript of the Bale Book (see Paragraph 6) if you use paper with the requisite number of columns.

10th. Copy of contracts, or the important clauses of same, between the Compress Company and the railroads or the customers.

11th. Under the reporting forms of policies it is customary to advance the Assured from seventy-five to ninety percent of their losses within three or four days of the fire, and as it may take three or four weeks to complete and recheck all the inventories and transcripts called for in paragraphs 4, 5, 6, 7, 8 and 9, the adjuster cannot postpone taking up the individual claims until all that work is finished. As soon as he has made a preliminary investigation of the

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fire, salvage and compress records and arranged to have the necessary inventories and transcripts made, the adjuster should call on all the Assureds having representatives in town and examine their receipts or other documents, which should be counted but not listed in detail, as that requires too much time. The adjuster will find in many instances the receipts are held by local banks and must be examined there. The object of this preliminary examination is to prevent fraud on the Underwriters by uninsured holders switching receipts to those having ample insurance, and to that end I first call on the Assureds whom I may have reason to suspect of being willing to perpetuate such fraud. If the adjuster is an experienced man he soon learns what firms he can trust. I usually explain to the bank or the Assured that it is necessary to list and check their collateral to the compress records, for which purpose I desire to take them to my own office, to which they seldom raise any objection. I then give the bank a statement over my signature as adjuster to the effect that I have taken collateral covering so many bales for listing and verification. This preliminary checking can usually be done in one day, and by that time the adjuster should have an approximate, though probably not an accurate or re-checked, inventory of the cotton saved, from which he can determine about how many of the Assured's bales were burned. He can then figure out the approximate value of the burned cotton, allowing himself a margin of safety to cover all possible errors of valuation or ownership of from 10 to 25 percent, as the case may warrant, and advise the Assured how much he is willing to advance. Have the Assured obtain a letter to the Underwriters from some reliable bank guaranteeing them against other claimants under the Ten-Day Clause (see Appendix, Bank Guarantee) and, if they are not already in his possession, take up the receipts or other collateral covering the burned cotton. Wire the Underwriters saying the Assured has lost approximately so many bales valued at approximately so much, for which you hold all necessary collateral and guarantee from stated bank, and recommend immediate advance of so much, saying how the advance is to be made, either by your giving the Assured draft on the Underwriters or having the Underwriters deposit the amount in some New York bank as the assured may prefer.

In making these advances it is not so important to determine the actual number of bales burned, for if you do happen to advance on a bale that has not been burned you are protected by holding collateral on which you could obtain the bale itself if the Assured re-

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fuse to rectify the error, which, however, is a condition I have never encountered. But, before making any advance, the adjuster must satisfy himself that the Assured actually owned the cotton covered by the receipts surrendered or be sure he is keeping the margin of safety high enough to cover all contingencies as to ownership. Remember these advances are made solely on the adjuster's recommendation, and he will find himself in a very embarrassing position if through his recommendation the Underwriters advanced 90 percent on a large number of bales which were subsequently found to be the property of some uninsured owner, and the Assured had no other property from which the Underwriters could recover. Of course if the adjuster accepts possession of receipts or other collateral as satisfactory and conclusive evidence of ownership, both the adjuster and the interested Underwriters will be relieved from all embarrassment through such errors, as there is then little probability of the frauds being discovered.

12th. We now come to a point where there is much difference of opinion as to the proper course to be pursued. I have always contended that in order to protect the Underwriters from loss by fraud or unintentional errors in adjusting the large warehouse or compress losses it is necessary to audit or examine the compress or warehouse books and possibly the railroad records in order to determine how many bales of cotton were actually on hand at time of casualty, and also to examine the individual claimant's records as previously explained. This is a difficult and expensive undertaking, for in a large loss it may consume three or four weeks or more of the time of the adjuster and two or three assistants, all of which is avoided if, as I have repeatedly stated, we are willing to accept possession of receipts or other documents as satisfactory evidence that cotton was held at the point named at time of casualty and at the risk of the parties producing the documents, but I cannot recall a single large loss where there were many interests involved where a thorough audit of the accounts has not resulted in a saving many times the cost of the work. The method followed in making these audits must necessarily be adapted to the records available in each individual case, but the object is to obtain a list of all the open entries; that is, of all the bales designated by numbers or marks, as the case may be, that are on hand at time of casualty. In order to verify this list it may be necessary to check all receipts and shipments from the beginning of the season to date of casualty and further verify shipments by checking the railroad records. If the

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numerical system is used, that is to say, if each individual bale is given a number, this list should be made up in numerical order (as explained in paragraph 6) and in a book or on paper carrying six or seven blank columns.

13th. The adjuster should next proceed to make a separate list of the cotton covered by receipts or other collateral produced by each claimant. These should show receipt number (listed in numerical order), date of issue, to whom issued, marks, grade and staple and weight. Also make a list of all bills of lading and other documents produced. I find much time is saved by using paper printed for this special purpose and making two carbons of each list. By the time these individual lists are made all the other inventories and transcripts should have been computed.

14th. The adjuster now has all the required information in form for ready reference and can take the claimant's list say, identified by letter A, and compare the receipt numbers with the numerical transcript of the compress records (see Par. 6 above), checking said transcript with the letter A opposite each receipt number found on the claimant's list, and checking the numbers on said list to indicate they are shown by the compress records as being on hand at time of casualty. Then make a similar check to the salvage inventory. If all check out with compress records, there is fairly conclusive evidence that the bales which do not appear on the salvage inventory have been burned.

15th. The next question is, did the Assured own the specified bales for which claim is made, and/or were they at his risk and had they been duly reported under cover of his Policy before the fire occurred? To answer this last question requires, as I have already explained, an audit of the Assured's books and records and his Daily Reports to his Insurers, if he carries a Per Bale Policy. If this check of the Assured's records is satisfactory, we may admit the cotton claimed for was actually burned while at the Assured's risk, that it had been duly reported under cover of the policy, and the Insurers were therefore liable for its market value, the determination of said value being as stated—the last of the adjuster's difficulties.

16th. The grade of the specific cotton under discussion may be ascertained in several ways. The Assured has probably had the cotton classed by his own men, and can furnish a record of same showing grade and staple of each bale. This can be checked to the original purchase invoices, which should virtually substantiate the

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grade. If the adjuster is not satisfied with this check, he may require the Assured to produce samples, which are usually kept at least until the cotton has been sold. The adjuster can examine these himself, or have them classed by some expert whose decision the Assured will probably accept, and thus determine the grade and staple, leaving only the question of market value to be settled, which should be ascertained as explained in the previous chapter on Prices and Quotations.

Cotton that is under B/L or other documents must of course be treated separately, and the question of liability decided by the documents in each case.

It is evident that if the above method is followed with all claimants, when all the lists have been checked, we should find our transcript of compress records and salvage inventory has been checked out and proved, it will show by the identifying letters or numbers the ownership of each bale on both lists, and thus furnish a balance sheet and proof of the compress and railroad records and all the individual accounts. That condition, alas, is a pleasant dream in which we occasionally indulge but seldom see realized in actual practice, for we usually find some Special Agent or adjusters on the ground, representing minor interests, who merely take the warehouse receipts handed them by their claimant, accept same as evidence of ownership and loss and without any further investigation take Proofs and get out of town, leaving no details of their settlement or giving any one a copy of their statements, or an opportunity to check same to the records, and with one such statement missing your balance is naturally out and the proof fails. Many Special Agents, and—I regret to say—some Company officials, will say that such system of checking as I have suggested following is an unnecessary trouble and expense, but let us consider that point.

Remember that in ascertaining the number of bales on hand or destroyed you are dealing with units having an established market value, and not with mere book values. Then remember what these units are worth, and you must admit that the saving resulting from finding a few errors will more than pay for the cost of the work. In fact I have never seen such a check attempted where it has not saved the Insurers in a direct reduction of the loss many times the cost of making it, entirely aside from the indirect benefit of the moral effect such system has on discouraging unscrupulous claimants making dishonest claims and unscrupulous holders of per bale policies not reporting and paying premiums on all cotton they handle

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or of taking care of some of their uninsured friends whose warehouse receipts they can include with their own. Let me cite two or three examples:

In a recent loss one prominent buyer of good financial standing, a director in the compress company, local banks and other institutions, submitted a list of his cotton on hand at the time of fire. This was checked to the bale book entries (see paragraph 6) and to the salvage inventory, and showed that approximately 500 bales of his cotton had been burned. The receipts for these burned bales had all been hypothecated with the bank as security for a loan of \$70 per bale. We had advanced \$65 per B/C on the 500 B/C before we completed our examination of the railroads' records. These receipts were listed by the adjusters and checked back to the compress records all right, but on checking the railroad records we found that 57 of the bales shown by the lists to have been on hand had in reality been shipped out some ten days before the fire. We then called on the Assured for a copy of his invoices covering all sales made during that season, which he willingly produced, and among which we identified an invoice covering these 57 bales. We called the attention of both the Assured and the compress management to this discrepancy, and both insisted it was impossible for any such error to have been made, the Assured priding himself on his accounting system and the fact that his employees were far beyond the average in intelligence and ability, all of which we willingly admitted. We advised the Assured that paying out the Companies' money had long ceased to cause us any pain, and we would cheerfully pay him for any 57 bales he had lost, but he must show us what bales he had lost, for we would not pay him for 57 bales that were apparently on the Atlantic Ocean when this fire occurred west of the Mississippi. The bank, of course, was loath to admit that they were carrying this loan on cotton which had been sold and paid for, and they insisted on a check of all the cancelled receipts in possession of the Compress Company, of which there were some 200,000, so the Assured and the adjuster each put men at that work, the result being that he finally admitted our figures were correct, and thus the Insurers—by the expenditure of \$200 or \$300—were saved approximately \$4,000, for had we paid for these 57 bales the error would never have been subsequently discovered. This Assured had no intention of defrauding the insurers and we know how the error was made, but that is another story.

By the same fire one planter lost over 50 bales which were not

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insured. Although the Compress Company had sufficient insurance to cover this cotton, they willingly admitted they had never made any agreement to insure same. The planter did not even allege he had instructed the compress to insure his cotton nor attempt to make claim under the Commission Clause of the Compress Company's policies, though he could have undoubtedly done so.

In this same fire a great deal of Long Staple Cotton was lost, and the services of a competent classer were secured to class the samples of the burned cotton which were on hand. This resulted in reducing values of the burned cotton some \$51,000, at an expense of less than \$1,500, yet there was no intent to deceive or defraud on the part of any claimant. There is of course always the usual tendency for every one to think their own cotton is a little better than the average, but we must always remember that examining and having samples classed is not of much avail against the unscrupulous or dishonest claimant. As an instance I recall one fire where a certain cotton buyer openly stated he had on hand a thousand samples of "Strict Middling 1 3/16" Staple, which was an exceptionally high grade cotton for that year and district, which samples he was ready to sell for \$1 each. Any unscrupulous claimant could easily have bought a few of these samples, and substituting them for those of his own cotton of lower grade, produced them for the adjuster's or classer's examination to verify the grades for which he was claiming. The buyer's sample room usually contains samples of many bales not involved in the fire, and if he wishes to be dishonest it is an easy matter to effect the necessary substitution, therefore always check your purchase invoices to verify grades, if they show an average below Middling and the Assured claims his burned cotton averaged better than Middling, and produces samples that grade an average Strict Middling, tell him that the age of miracles is past.

HANDLING SALVAGE.

As soon as the fire is extinguished arrangements should be made to dispose of the Salvage for account of whom it may concern. The warehouseman, as custodian or bailee of the cotton, has the power, in fact it is his duty, to arrange for its disposal in such manner as in his judgment will best protect the owner's interest; and he will usually agree to let the Underwriters' representatives handle it in any manner they suggest.

In the majority of cotton losses there will be more or less Salvage that cannot be identified as having come from any specific bale

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or bales. Hence it is impossible to determine its ownership. All such unidentified Salvage must be sold and the proceeds divided between the various losers, in the proportion that each individual's loss bears of the total value of all the cotton lost.

When the ownership of any damaged bale or lot of damaged cotton can be satisfactorily determined, the salvage therefrom should be handled and sold as a separate and distinct lot, and the proceeds revert to the owners or their insurers.

Damaged cotton, like any other commodity, can be sold as it lays or it can be sorted, picked, conditioned and rebaled before being sold. This work can be done at the scene of fire, or it can be shipped to some pickery for that purpose.

If the market conditions are favorable, it is usually better to sell it as it lays rather than pick and recondition it; but if it is sold "as is" the sale must be made without delay; and we sometimes find the Salvage buyers, through forming a secret pool, will refrain from offering any reasonable price for it where it lays, in which event the adjusters must arrange to have it reconditioned. Whether this work can best be done on the spot or by shipping it to some pickery will be governed by local labor and market conditions, freight rates, etc.

In order to protect the Underwriters' interests, the Adjuster must be capable of determining what the Salvage should sell for as it lays, the cost of reconditioning it and what it should turn out and sell for when conditioned. Such knowledge can only be gained by actual experience (for which the Underwriters pay dearly) in closely following up and analyzing returns from various sales, to see how close the Adjusters' estimates were to actual results.

There are several methods of estimating Salvage value: First, there is the gambler's method of taking a look at the Salvage as a whole and guessing at what it is worth without making any computation of the number of pounds of White Cotton, Pickings, etc., it should turn out. I know of one small lot of cotton which was sold by Adjusters following this method for \$600, and subsequently resold by the buyer as it lay for \$4,500 to a man who told me confidentially that he netted \$6,000 profit from the transaction.

I think the better method is to examine carefully every bale or lot of loose cotton and estimate the number of pounds of White cotton, Stained cotton and Burned Pickings that should be recovered from it. This will give the number of bales of White cotton, Stained

COTTON LOSSES AND COTTON SALVAGE HANDLING

and Burned Picking which the reconditioned cotton should turn out. From this the gross returns can readily be figured, and the cost of reconditioning can be estimated with reasonable certainty, as it is usually done under contract. Thus the Adjuster can tell what the net returns should be and thereby determine what price he should get for the cotton as it lays. As an example, we will give you a synopsis of the actual figures made in estimating the Salvage remaining from a fire which destroyed some 7,000 B/C, when Middling Cotton was selling for 13c. In this case there were 21 piles of broken bales and loose cotton, each of which was measured and the number of pounds estimated on the basis of so many pounds per cubic foot, according to the density of the individual pile. This gave us a total of 121,000 pounds estimated "turn out" from the 21 piles. There were the remains of 169 Flat bales running from 50 to 400 pounds each; and the remains of 271 Compressed bales, all of which were estimated separately, giving the following results:

SALVAGE ESTIMATES

Loose Cotton Est. (242 B/C No. 500)			
60,000 Burned pickings @ .08.....	\$ 3,600.00		
38,000 Loose @ .09 1/4.....	3,610.00		
5,000 Loose @ .05.....	300.00		
18,000 Loose @ .10.....	1,800.00		
121,000—242 B/C.....	\$ 9,310.00		
Less expenses and freight @ 2c per lb.....		\$2,420.00	\$ 6,890.00
Uncompressed 169 B/C Est.			
38,002 White @ .11.....	\$ 4,180.22		
10,150 Stains @ .09 1/4.....	938.87		
10,850 Burnt @ .07 1/4.....	786.62		
59,002.....	5,905.71		
Less expenses and freight @ 2c per lb...		\$1,180.04	4,725.67
Compressed—271 B/C			
90,350 White @ .11 1/4.....	\$10,390.25		
13,550 Stains @ .09 1/4.....	1,253.37		
18,550 Burnt @ .07 1/4.....	982.37		
2,000 Loose @ .09 1/4.....	190.00		
119,450.....	\$12,815.99		
Less expenses and freight.....		\$1,650.00	\$11,165.99
Estimated gross returns, \$28,031.70.			
Less estimated expenses \$5,250.04.			
Estimated net returns, \$22,781.66.			

This cotton was advertised for sale under sealed bids, subject to previous sale or withdrawal and the privilege of rejecting any or all bids. Five bids were submitted, ranging from \$16,500 to \$22,750, one bid for \$22,500 being put in at the suggestion of the adjusters. The adjuster decided to reject all bids and shortly afterwards sold all the cotton at private sale for \$23,500 to the parties making the \$22,750 bid.

APPENDIX.

Form No. 8C.—(Revised 1-1-16.)

GENERAL FLOATER.

\$.....On Cotton in bales, owned or held by the assured in trust, or on commission, or on joint account with others, or sold but not delivered, in all or any of the Stores, Presses, Warehouses, Sheds, Yards, Railroad

THE FIRE INSURANCE CONTRACT

Yards and Wharves (.....excepted),
or while in transit in or while on any of the streets in.....

This insurance is effected subject to the following conditions, which are hereby made warranties by the assured, and are accepted as parts of this contract:

A. It is understood and agreed to be a condition of this insurance that this policy shall cover cotton at any of the Presses (.....excepted), the fact of bills of lading having been signed for the same notwithstanding.

B. Cotton Co-Insurance Clause—It is understood and agreed that the assured shall at all times maintain insurance on the property insured by this policy equal to the actual cash value thereof, and that failing so to do, the assured shall be an insurer to the extent of such deficit, and in that event shall bear his, her or their proportion of any loss on such property, and this Company shall be liable for not exceeding such proportion of the loss or damage as the amount insured by this policy shall bear to the actual cash value of such property in all localities covered by this policy at the time of the fire.

C. Standard Time Clause—It is understood and agreed that the word "noon" as used herein, in designating the beginning and ending of the term of insurance, refers to Standard Time at the place where the property is located.

D. Other insurance, warranted concurrent herewith, permitted without notice until required.

E. Attached to and forming part of Policy No.....of the.....
.....Insurance Company, of Agent.

Note—Agents will sign and paste one on Policy, one on Daily Report, and one on Register.

Form No. 9C.

LIMITED FLOATER.

\$.....On Cotton in bales, owned or held by the assured in trust, or on commission, or on joint account with others, or sold but not delivered, contained in the following specifically described Warehouses, Compresses and Wharves, including sidewalks, platforms and streets adjacent thereto; also while in transit through streets between localities named herein, namely: all situated in the city of

This insurance is effected subject to the following conditions, which are hereby made warranties by the assured, and are accepted as parts of this contract:

It is understood and agreed that Cotton is not covered by this policy if left on sidewalks, platforms, and/or streets on nights or on Sundays and holidays.

This form also carries clauses A, B, C, and D as given above in Form No. 8C.

Form No. 10B.—(Revised 1-1-16.)

OPEN WAREHOUSE and/or COMPRESS.

\$.....On Cotton in bales, owned or held by the assured in trust, or on commission, or on account with others, or sold but not delivered, only while contained in the.....story.....building, with.....roof, situated No.....on the.....side of.....Street, Block No....., known as.....Warehouse and/or Compress in.....

This insurance is effected subject to the following conditions, which are hereby made warranties by the assured, and are accepted as parts of this contract:

Warranted by the assured that no cotton will be left outside of sheds or beyond the apron of roof in the court at night or on Sundays and holidays. And at all times, while cotton is being kept or handled in open court, a clear space of not less than eight feet shall be maintained between the cotton in open court and apron of roof.

This form also carries clauses B, C, D, and E as given above on Form No. 8C.

Form No. 10C.—(Revised 1-1-16.)

CLOSE WAREHOUSE and or COMPRESS.

\$.....On Cotton in bales, owned or held by the assured in trust, or on commission, or on joint account with others, or sold but not delivered, only while contained in the.....story.....building, with.....roof, situated No.....on the.....side of.....Street, Block No....., known as.....Warehouse and/or Compress, in.....

This insurance is effected subject to the following conditions, which are hereby made warranties by the assured, and are accepted as parts of this contract:

See clauses B, C, D, and E on Form 8C above.

COTTON LOSSES AND COTTON SALVAGE HANDLING

Form No. 11E.—10-20-14.

BALED COTTON, SEED COTTON AND COTTON SEED ON GINNERY PREMISES.

\$.....On Cotton Ginned and Unginned, Baled and Unbaled, Seed Cotton, Cotton Seed, including sacks or packages containing same, and Bagging and Ties, only while contained in Cotton Houses or Sheds, Seed Houses or Sheds and while passing through the Cotton Ginnery and while in wagons on premises, or on the Ginnery Yard or premises; also in or on cars within two hundred feet of Gin premises. This insurance attaches on cars only when Bill of Lading has not been signed. Their own or held by them in trust or on commission, or sold but not delivered, or being ginned or handled for assured's own account, or for the account of others and for which the assured may be liable.

\$.....On Cotton Seed, including sacks or packages containing same, only while contained in the Seed Houses or Sheds and while in wagons on premises, or on Ginnery Yard or premises; also in or on cars within two hundred feet of Gin premises. This insurance attaches on cars only when Bill of Lading has not been signed. Their own or held by them in trust or on commission or sold but not delivered, or being ginned or handled for assured's own account, or for the account of others and for which the assured may be liable.....

All of the above described property being located on the premises known as Ginnery in the town of.....County of.....State of.....

Right to Replace—Notice is hereby given that in the event of loss under this policy this Company has the right to replace with cotton of like kind and quality the cotton that may be damaged or destroyed by fire as provided for under the printed conditions of the policy.

Eighty Per Cent. Co-Insurance Clause (applicable to Item No. 2)—It is a part of the consideration of this policy, and the basis upon which the rate of premium is fixed, that it is expressly stipulated and made a condition of the contract that, in event of loss, this Company shall be liable for no greater proportion thereof than the amount hereby insured bears to eighty per cent. of the actual value of the property described herein at the time when such loss shall happen, nor for more than the proportion which this policy bears to the total insurance thereon. If this policy be divided into two or more items, the foregoing conditions shall apply to each item separately.

This form also carries clauses B (applicable to Item No. 1), C, D, and E as given on Form No. 8C above, and likewise the Lightning Clause.

Form No. 12—(Revised 9-22-15.)

COTTON FORM FOR SPRINKLERED COTTON WAREHOUSES.

\$.....On Cotton in bales, owned or held by the assured in trust, or on commission, or on joint account with others, or sold but not delivered, only while contained in the.....story.....building, with.....roof, situated No.....on the.....side of.....Street, Block No.....known as.....Warehouse, in.....

This insurance is effected subject to the following conditions, which are hereby made warranties by the assured, and are accepted as parts of this contract:

Cotton Storage Warranty—It is hereby agreed and understood to be a condition of this insurance and warranty on the part of the assured that for and in consideration of a reduction in the rate of premium given by reason hereof, that not more than.....bales should be stored in any one compartment of the within described building at any one time and that cotton should not be stored over.....bales deep on sides. It being further agreed and understood that if more than the above named number of bales be stored in the within described premises at time of fire, this policy shall thereby become absolutely void.

Warranted by the assured that no cotton shall be left on the platforms or in yards or in courts adjoining the above warehouse between the hours of 8 p. m. and 6 a. m.

It is understood and agreed this policy covers only the cotton contained in the.....which are equipped with automatic sprinklers.

Sprinkler and Fire Protection Clause—In consideration of the reduced rate at which this policy is written, it is understood, agreed and made a part of this contract that in so far as the sprinkler system and the water supplies for same, and any of the private fire protection for which credit is given, are under the control of the assured, due diligence shall be used by the assured to maintain them in complete working order, and that no change shall be made in the sprinkler system or in the water supplies for same without the consent of this Company in writing.

Cotton (Prohibition of Smoking)—Warranted by the assured that no smoking will be allowed in the warehouse, compress, platform or yard described in the within policy.

This form also carries clauses B, C, D, and E as given on Form 8C above.

THE FIRE INSURANCE CONTRACT

Form No. 12A.—10-20-14.

COTTON FORM FOR SPRINKLERED COTTON WAREHOUSES.

(In Connection with Platforms, Courts and Yards.)

§.....On Cotton in bales, owned or held by the assured in trust or on commission, or on joint account with others, or sold but not delivered, while being received or delivered on the platforms, yards or courts adjoining.....

Warranted by the assured that no cotton shall be left on the platforms or in yards or in courts between the hours of 8 p. m. and 6 a. m., this policy not covering during such hours.

This form also carries clauses B, C, D, and E (see Form No. 8C above), and the Right to Replace Clause (see Form No. 11E).

Form No. 12B.—10-20-14.

COTTON IN BALES ON PLANTATION OR IN COUNTRY.

(With One Hundred Feet Clear Space Clause.)

§.....On Cotton in bales, owned or held by the assured in trust, or on commission, or on joint account with others, or sold but not delivered, contained in, and/or on premises of.....situate.....

One Hundred Feet Clear Space Clause—Warranted by assured that a clear space of not less than 100 feet will at all times be maintained between cotton insured hereunder and any Gin House or other special hazard.

Sample and Weight Clause—(Warranty to sample and weight each bale of cotton, and to produce such sample and record of weight in case of loss)—The following covenant and warranty is hereby made a part of this policy:

1st. The assured will take sample of, and record the weight of, each bale of cotton insured under this policy, and unless such sample has been taken, and weight recorded, this policy shall not be in effect, but shall be null and void until such sample has been taken and weight recorded.

2d. The assured will keep such samples and record of weights in some place not exposed to a fire which would destroy the cotton insured.

In the event of failure to produce such samples and record of weights for the inspection of this Company, this policy shall become null and void, and such failure shall constitute a perpetual bar to any recovery thereon.

This form carries also clauses B, C, D, and E (see Form No. 8C), and likewise the Right to Replace Clause (see Form No. 11E) and the Lightning Clause.

Form No. 13A.—9-14.

COTTON FORMS—MARKS AND NUMBERS.

(Form For Insuring By Marks, Numbers and Amount Per Bale.)

On.....bales of Cotton, being a specific insurance of not exceeding \$.....on each bale, marked and numbered as follows:.....owned or held by assured in trust, or on commission, or on joint account with others, or sold but not delivered, or upon which advances have been made, all while contained in.....

Total insurance, concurrent herewith, permitted, including this policy, not to exceed \$..... per bale.

Warranty Against Substitution of Cotton—It is a condition of this contract that this insurance shall cover only the identical bales of cotton bearing the marks and numbers designated in this policy, and situated at the location described herein at the time said policy is issued; and the assured hereby warrants that other bales of cotton will not be substituted for those originally designated, and that it will not be claimed that this policy protects any other bales of cotton identically marked and numbered which may be placed at the locality described herein after the issuance of this policy; and any violation of this warranty shall render this policy null and void.

Loss Payable Clause—The property covered by this policy may be pledged without notice as collateral security for loans or advances, but loss, if any, under this policy shall be adjusted with the assured, and is payable only to the assured or their order endorsed on or attached to this policy.

This form carries also the Right to Replace Clause (see Form No. 11E above).

Form 300.—(Season 1916-1917.)

BUYER'S TRANSIT.

1. On cotton in bales, their own or purchased for their account by their agents, employees and correspondents, in the United States of America in the manner hereinafter stated, to cover during the whole time cotton is at the risk of the assured, including cotton in bales shipped under local bill-of-lading to places (other than ports) in the United States for concentration and re-shipping under the same or different marks, and also cotton in bales shipped under through bill-of-lading by all-rail route to final destination, but only when certificates have been issued thereon as hereinafter provided for.

COTTON LOSSES AND COTTON SALVAGE HANDLING

2. The liability under this policy to commence from the moment the cotton has become the property of the assured and absolutely at his or their risk, provided, however, no cotton under contract of purchase by the assured shall be deemed at risk hereunder, unless its location with its specific marks and numbers be stated in the contract of purchase, or in a confirmation thereof furnished to the purchaser immediately thereafter and before known or supposed loss, nor unless such cotton is reported to this Company at the time of the contract to purchase.

3. Warranted by the assured to report all cotton purchased and/or at the risk of the assured in any way during the life of this policy and in the event of failure to report any such cotton this policy shall not be liable for a greater proportion of any loss than the amount of cotton reported to this Company bears to the total amount purchased and/or in any way at the assured's risk during the term of this insurance.

4. Wherever cotton to be covered as above, is located in a State or States other than that in which this policy is issued, the same will be covered by a certificate adopting all the terms and conditions of said policy, issued by a Resident Agent of said other State or States in accordance with the laws thereof, which certificate will be furnished the assured and to take effect from the time such cotton is purchased by the assured.

5. Cotton located within 100 feet of the gin house in which it was baled is not covered under this policy.

6. Under no condition does this policy cover cotton after it has become waterbourne or cotton on river steamers, boats or barges.

7. Cotton sold prior to shipment or sold free on board cars at point of shipment is to be covered only until it ceases to be at the risk of the assured.

8. Cotton sold free on board cars at final destination is covered only until the issue of the Carrier's Bill of Lading to such destination, unless insured under certificate as provided for in this policy.

9. Shipments insured to final destination by all-rail routes are held covered until delivered to warehouse or mill, but not in any case to exceed five days after arrival at destination. Such risk to warehouse or mill to terminate, however, if delivery is stopped or delayed by order of the assured.

10. It is agreed that this Company shall not be liable for more than such proportion of any loss as the limit of liability mentioned below applying at the place where any loss or damage shall occur bears to the total value of the cotton at such location at the time of any loss or damage.

11. Unless specifically stated to the contrary in an endorsement attached to this policy it is agreed that the limit for loss by any one fire shall not exceed Dollars, (\$.....)

12. It is understood and agreed, however, that this limit does not apply on any cotton which has been delivered to the railroad or other carrier for shipment and has passed beyond the control of the assured, and which is covered by certificates (issued prior to known loss or exposure thereto) such shipments being fully covered for the amount stated in such certificates without regard to said limit.

13. Agents of this Company at..... are authorized by this policy to issue certificates and countersign the same, covering shipments insured hereunder to final destination, but only under the terms and conditions of this policy, making the loss, if any, payable to the holder thereof. And it is hereby declared and agreed that the amounts and values as stated in such certificates shall be the amounts and values applicable to this policy, and said certificates shall represent and take the place of the original policy, and convey all the rights of the assured (for the purpose of collecting loss or claim) as fully as if the property was covered by a special policy direct to the holders of the certificates, but the holders of such certificates, other than the assured, shall not be held liable for unpaid premium.

14. In case of loss hereunder arising before certificates of insurance are issued, such sum or sums as this Company shall be obligated to pay or advance, if any, shall be payable to banks, bankers or other parties having made advance against said cotton, so far as their interest may appear, provided this company received notice of such interest within ten days after the loss. In the absence of such notice loss is payable to the assured.

15. This Company shall not be liable for more than the actual cash value of the cotton at the time of the loss and place of fire happening prior to the issue of all certificates of insurance, and shall in no event exceed what it would then and there cost to replace same, plus all customary shipping charges, with cotton of like kind and quality.

16. When this policy becomes effective the assured agrees to report to this Company through its Agent as named herein, all cotton in his or their possession and thereafter to REPORT DAILY, SUNDAYS AND HOLIDAYS EXCEPTED, all purchases, sales and/or shipments of cotton made by him or them, including in this report the value of all such sales and/or shipments.

17. It is further understood and agreed that all cotton the property of the assured under local bills of lading shall be declared and kept under report for premium just as though it was solely at the assured's risk.

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18. The assured agrees to pay to this Company on the fifteenth (15) day of each month the agreed premium for the preceding month. In case of default of such payment this policy may be cancelled by this Company upon twenty-four hours written or telegraphic notice to the assured, and at the expiration of such notice all risk hereunder shall cease and terminate except as to shipments covered under certificates issued prior to receipt of such notice, but this Company shall nevertheless be entitled to receive premium upon all cotton on hand at the time of such cancellation in payment for all risk previously covered hereunder.

19. The assured under this policy hereby covenants and agrees to keep a set of books, showing a complete daily record of all cotton handled, showing among other things the weight and classification of each bale, and all purchases, sales and/or shipments with the identity of each bale and its location and removal from yards or compresses to other locations, and in case of loss to produce such books to this Company or this policy shall be void.

20. The assured agrees that this Company, by a properly authorized representative, shall be permitted to examine the books of the assured and any (or all) of their agents, employees and correspondents at least once every month for the purpose of verifying the accuracy of the returns made under this policy.

21. It is stipulated that this Company shall not be liable for any loss hereunder for which any carrier or other bailee may be liable, but shall only be liable in the event of failure to collect the same from such carrier or bailee.

22. The assured warrants that this insurance shall not inure directly or indirectly to the benefit of any carrier, or other bailee by stipulation in bill of lading or otherwise; and that this policy shall be null and void to the extent of any amount paid by or recoverable from any carrier and/or bailee, and that any risk against fire granted herein shall not cover where any carrier or other bailee has insurance which would attach if this policy had not been issued.

23. The assured warrants not to release any carrier, compress company, or other bailee, who may be liable for cotton in his or their custody, from any liability whatsoever which law or custom may impose.

24. This Company in addition to the right reserved elsewhere to cancel this entire policy reserves the right to cancel on five days notice to the assured, all liability hereunder on cotton on the premises of any compress and/or warehouse and/or terminal company which may refuse to adopt such recommendations as may be made by this Company for the protection of such cotton.

25. In the event of loss and upon receipt of advice thereof by the assured immediate notice shall be given to this Company and this Company shall be at liberty to investigate the circumstances attending same and ascertain the amount of loss without such action operating to waive any forfeiture or admit any liability, but all claims to be payable after the expiration of fifteen days from receipt of such notice, provided satisfactory proofs have been filed.

26. Other insurance permitted without notice until required. Other insurance, if any, shall be deemed concurrent with this insurance and shall contribute pro rata in the payment of any loss.

Attached to and forming part of Policy No.
of the

This Policy expires on the first day of September, 191....

.....Agent

Form M.

Schedule attached to Policy No. in name of.....

On cotton, in bales, to be declared and valued as hereinafter provided.

1. To cover all cotton in the United States purchased by the assured or for their account, attaching from the moment the cotton becomes the property of the assured or legally at their risk, provided, however, that no cotton shall be covered hereunder prior to actual delivery to the assured or their agents, unless specifically identified by marks and numbers or other designation in possession of the assured or mailed to the assured prior to loss.

2. Per railroad and/or steamer or steamers and/or connecting conveyances, including barges from Houston to Galveston and held covered while on board of craft and/or lighter to and from the vessel (each craft and/or lighter being deemed a separate insurance), but excluding all risk by river steamers or barges or by conveyances on the Great Lakes. Cotton laden on steamers covered under deck only unless otherwise agreed. This policy does not cover shipments by sailing vessels.

3. This Company reserves the right to exclude from this policy shipments by steamers whose nationality has been changed after the commencement of hostilities.

4. Held covered, at a premium to be arranged, in case of deviation or change of voyage or transfer to other steamers, provided notice be given to the assurers as soon as known to the assured.

5. The presence of the negligence clause and/or latent defect clause and/or liberties in the Bills of Lading and/or Charter Party and/or Contract of Affreightment, shall not prejudice this insurance.

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6. At and from ports or places in the United States of America to ports or places in the United States or Canada or to port or ports in the United Kingdom or on the Continent of Europe, or in Mexico, China, Japan, India or Manila, or to such other port or ports as may be agreed, direct or indirect, including the risk of transshipment. Shipments to Germany, Russia, Austria or Turkey not covered unless by special agreement.

7. Including the risk of damage or destruction by fire, tidal waves, or overflowing rivers, while the cotton is in process of and/or awaiting shipment or sale, in warehouses, compresses, yards and/or on wharves, levees or elsewhere on land, in the United States.

8. To pay particular average on each ten bales as if separately insured, if amounting to three per cent., unless otherwise agreed, and on shipments to Europe to pay sea damage pickings claims without reference to series or amount. General Average and Salvage Charges payable according to Foreign Statement or per York-Antwerp Rules, if in accordance with the Contract of Affreightment.

9. This policy also covers the risk of country damage on shipments insured hereunder to Europe, Japan, China, India or Manila, subject to settlement at destination named in certificate or declaration in accordance with customs and usages of the port of destination, unless otherwise specified in certificate, but no claim for loss of or damage to cotton picked or reconditioned in the United States nor for any cost or expense in respect of such picking or reconditioning shall be recoverable hereunder. Country damage is not covered on Cost and Freight shipments and Local Sales, nor on shipments to points in the United States or Canada or Mexico.

10. Unless otherwise mutually agreed, the assured are not at liberty to exclude, cancel or insure elsewhere, any risk applicable to this policy.

11. The assured are authorized to issue certificates in duplicate and countersign the same, covering shipments insured hereunder, subject to the terms and conditions of this policy, and making loss, if any, payable to the holder thereof, provided, however, that memoranda of such certificates shall be mailed to this Company on the day of issue, and it is hereby agreed that the amounts and values stated in such certificates shall be the amounts and values applicable to this policy, and that said certificates shall represent and take the place of the original policy and convey all the rights of the Assured (for the purpose of collecting any loss or claim) as fully as if the property were covered by a special policy direct to the holder of the certificate.

12. In case of loss or claim before such certificates have been issued and negotiated and reported to this Company as above provided, the amount applicable to this policy shall be the actual market value of the cotton at the time and place of loss, provided, however, that the assurers shall always have the right, in lieu of cash payment, to replace any lost or damaged cotton with other cotton equivalent in value and as nearly as practicable of the same grade and staple. Such loss shall be payable to banks, bankers, or other parties, as interest may appear, provided this Company receives written notice of such interest within ten days after loss, but otherwise shall be payable to the assured or order.

13. Additional amounts to cover advances in market value of the cotton held covered hereunder at rates to be agreed (whether the original insurance has been effected under this policy or elsewhere), provided applications therefor are mailed to the assurers prior to loss or casualty being known to either party or the vessels being overdue.

14. Foreign shipments held covered until delivery to warehouse or railway station at port of discharge or (by railway or other land conveyance) until delivery at mills or other interior destination when so specified in certificate. Shipments to mills or other destination in United States or Canada held covered until delivery into the consignee's warehouse or mill. In case delivery to warehouse or mill is stopped or delayed by order of the assured, the risk hereunder shall thereupon terminate.

15. Cotton resold prior to shipment, or sold for shipment on "Cost and Freight" terms, or for delivery at a seaport in the United States, to be covered until it ceases to be at the risk of the assured (but not after delivery on board the seagoing vessels and/or steamers).

16. Warranted by the assured as a condition of this insurance that all purchases and sales and/or shipments of cotton insured hereunder shall be reported daily (Sundays and holidays excluded) to this Company, and that an accurate record shall be kept by the assured of all such purchases, sales and/or shipments, showing the dates of all such transactions and other particulars affecting this insurance—which record shall be open to the inspection of an authorized representative of this Company on request.

17. Warranted by the Assured free from any liability for merchandise in the possession of any carrier or other bailee who may be liable for any loss or damage thereto; and free from any liability for merchandise shipped under a bill of lading containing a stipulation that the carrier may have the benefit of any insurance thereon; and that any assurance against fire granted herein shall be null and void to the extent of any fire insurance which the assured or any carrier or other bailee has, at the time of the fire, and which would attach if this policy had not been issued.

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18. It is warranted by the assured that they will not relieve any carrier or other bailee from any statutory or common law liability or duty.

19. The liability hereunder for loss by any one fire prior to shipment to final destination is limited to.....Dollars. It is understood and agreed, however, that this limit does not apply on any cotton which has been delivered to the railroad or other carrier for shipment and has passed beyond the control of the assured, and which is covered by certificates (issued prior to known or supposed loss) such shipments being fully covered for the amount stated in such certificates without regard to said \$.....limit.

20. Warranted by the assured free from loss or expense arising from capture, seizure, restraint, detention or destruction, and the consequences thereof, or of any attempt thereat and also from all consequences of riots, civil commotions, insurrections, hostilities or warlike operations, whether before or after declaration of war; and whether lawful or unlawful and whether by the act of any belligerent nations, or by governments of seceding or revolting states, or by unauthorized or lawless persons therein, or otherwise; and whether occurring in a port of distress or otherwise. Also warranted not to abandon in case of blockade, and free from any expense in consequence thereof, but in the event of blockade to be at liberty to proceed to any open port and there end the voyage. It is also agreed that the property be warranted by the assured free from any charge, damage or loss, which may arise in consequence of a seizure or detention for, or on account of, any illicit or prohibited trade, or any trade in articles contraband of war, or the violation of any port regulation.

21. This policy to be continuous and cover as above until..... inclusive, unless sooner cancelled by either party giving 30 days' notice in writing, and to be null and void thereafter, excepting as to the risks then pending on cotton which has been actually delivered to the carrier for shipment to final destination. This Company reserves the right, however, to cancel on five (5) days' notice to the assured, all liability hereunder on cotton on the premises of any compress and/or warehouse company which may refuse to adopt such recommendations as may be made by this company for the protection of such cotton.

22. Premiums payable on demand in New York Exchange. In case of default in such payment, this policy may be cancelled by the assurers upon 24 hours' written or telegraphic notice to the assured, and at the expiration of such notice all risk hereunder shall cease and terminate except as to shipments covered under certificates issued prior to receipt of such notice, but the assurers shall nevertheless be entitled to receive premium upon all cotton on hand at the time of such cancellation in payment for the risk previously covered hereunder.

STANDARD MARINE INSURANCE CO., LTD.

New York.....19

United States Manager and Attorney.

DAILY REPORTS UNDER PER SALE POLICIES.

1. The daily reports required by these policies are usually made up in the following form:

NOTE.—Every bale of cotton purchased, whether at risk under this policy or not, should be entered on the report under the head of "Total Purchases and Sales" and accounted for subsequently. In case of any cotton on which no risk is subsequently covered under this policy, particulars are to be shown in column 8 in due course.

DAILY REPORT No..... Date.....19....
To the.....Insurance Co. of.....

With reference to the warranty in our open policy No.....reading:

"Warranted by the assured as a condition of this insurance that all purchases and sales and/or shipments of cotton insured hereunder shall be reported daily (Sundays and holidays excluded) to this Company, and that an accurate record shall be kept by the assured of all such purchases, sales and/or shipments, showing the date of all such transactions and other particulars affecting this insurance—which record shall be open to the inspection of an authorized representative of this Company on request."

We hereby report as follows:

TOTAL PURCHASES AND SALES.

	Bales
Purchased today (for immediate or future delivery)	
Previously purchased this season	
Total purchased this season to date	
Total sales and/or shipments reported to date (totals of columns 5, 7 and 8)	
Balance to be accounted for	

PARTICULARS OF COTTON IN COMPRESSES, WAREHOUSES OR YARDS.

(Note.—Each compress, warehouse or yard where cotton is held in process of, or awaiting shipment should be listed separately.)

COTTON LOSSES AND COTTON SALVAGE HANDLING

AT RISK UNDER POLICY

Class		1	2	3	4	5	6	7	8
A	Name of Compress, Warehouse or Yard	LOCATION	No. of Bales on hand at last report	No. of Bales rec'd since last report	Shipments or local sales since last report	Balance on hand	Ships with no risk prior to issue of B/L to final destination	Sales and/or Ships, never at risk of the Assured*	
	TOTAL								

*This information is to reconcile sales at risk with "Total Purchases & Sales."

Form 13

**PARTICULARS OF SHIPMENTS OR SALES MADE IN MANNER
INDICATED BELOW.**

Of the shipments above reported.....Bales were insured to destination
under certificates

No.....as per copies or stubs herewith, {
from class A compresses.....B/C
from class B compresses.....B/C
from class C compresses.....B/C
from class D compresses.....B/C

BALES INSURED TO DESTINATION—NO CERTIFICATES ISSUED.

NOTE.—Please indicate in remarks column:—(1) Whether shipments exclude all wharf and/or terminal risk at Southern ports. (2) Show Southern transshipping port on shipments to Northern ports.

From	To	Bales	Value	Conveyances		Class of Com- press from which cotton shipped	Remarks
				R. R.	Steam-ship Line		
.	.	.	.	.	.	.	.
.	.	.	.	.	.	.	.
.	.	.	.	.	.	.	.
.	.	.	.	.	.	.	.
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.	.	.	.	.	.	.	.
.	.	.	.	.	.	.	.
.	.	.	.	.	.	.	.
Total	.	.	.	.	.	.	.

SHIPPED COST and FREIGHT or SOLD LOCALLY.

	Bales	Value	Class of Com- press from which cotton shipped	Re- marks
Risk terminating upon issue of B/L in the interior.				
Local sales at seaports, excluding wharf risk.				
Shore Risk attaching at seaports including wharf risk or covering until laden on board steamer.				
Local Sales at interior points.				
Shore Risk attaching at interior points and cover- ing until laden on board steamer.				
Shore Risk attaching at interior points upon issue of B/L to final destination and covering until laden on board steamer.				
Total Cost and Freight.				
Signature of Assured.				

THE FIRE INSURANCE CONTRACT

Form 302.

COMPRESS LIABILITY FOR TRANSPORTATION LINES.

1. On their legal liability for loss or damage by fire to cotton in bales, to be declared by classes as hereinafter provided.

2. For the account of the assured this insurance covers the legal liability as common carriers or warehousemen of the hereinafter named transportation line or lines, for loss or damage by fire to the classes of cotton herein described as "A," "B," "C" and "D," while in the custody of the assured for the account of such transportation line or lines; all while contained in the compress or compresses, sheds, platforms and/or yards on their premises, and on the grounds immediately adjacent thereto and in or on cars on the switch tracks of the said Compress Company situate at:

3. A. On Outbound Cotton in bales originating at the point of compression for transportation by the transportation line or lines herein named, while in the custody of the assured, for which bills of lading have been signed by duly authorized agents of the transportation line or lines herein named, or compress receipts exchangeable by their terms for bills of lading have been issued.

4. B. On Outbound Cotton under shipping instructions tendered the transportation line or lines herein named, while in the custody of the assured, loaded and/or being loaded for which cotton no bill of lading, or compress receipt, exchangeable by its terms for a bill of lading, has been issued.

5. C. On Inbound Cotton under "Shippers Order" bills of lading, while in the custody of the assured for the account of the transportation line or lines herein named until the surrender of the bill of lading.

6. D. On Transit Cotton stopped for the purpose of compression, while in the custody of the assured for the account of the transportation line or lines herein named, to-wit: cotton carried by the railway company under through bills of lading originating at some place other than the compress of this assured and consigned to destination beyond the compress of this assured and unloaded while in transit for the purpose of compression.

7. It is understood and agreed by this Company that unintentional omissions and/or errors on the part of the assured in reporting cotton in accordance with the requirements of this policy, as hereinafter provided, do not vitiate this insurance, and the assured agrees to pay premium at the rates agreed on all cotton not reported through such omission and/or errors; it is specifically understood and agreed, however, that the intentional omission to report any cotton which should be included in any one or several of the classes of cotton herein described as "A," "B," "C" and "D," for the account of any of the transportation line or lines, shall render null and void the insurance herein granted on the particular class or classes from which said cotton was purposely omitted for the account of such transportation line or lines.

8. This company shall not be liable for more than.....Dollars by any one fire at any one compress.

9. Loss, if any, payable to the transportation line or lines named herein, as interest may appear, subject nevertheless to all the conditions of this policy.

10. It is agreed that this company waives any and all right to subrogation which it might otherwise have under this policy, as against the transportation line or lines whose interests are covered hereunder.

11. The assured agrees to report the number of bales on hand in their custody for the transportation line or lines herein named, when this policy takes effect and thereafter to report daily to

- (1) The number of such bales on hand at last report.
- (2) The number of such bales received during the day.
- (3) The number of such bales shipped out during the day.
- (4) The number of such bales remaining on hand.

12. The assured agrees within 15 days after the close of each month to pay to this company the agreed premium for this insurance for the preceding month.

13. It is agreed that the insurers, by a properly authorized representative, shall be permitted to examine the books of the assured and (or) any and all of their agents and employees, at least once every month for the purpose of verifying the accuracy of the returns made under this policy.

14. This company shall not be liable for more than the actual cash value of the cotton at the time of the loss and at the place of the fire, which cash value shall in no event exceed what it would then cost to replace same, plus all customary shipping charges, with cotton of like kind and quality.

15. It is agreed that the liability of this company for any loss under this policy is limited to the percentage of the value of any one bale which the amount of this policy bears to the total insurance at the time of the fire, and the assured agrees to maintain insurance to the full value of each and every bale, or be a co-insurer for the deficiency.

COTTON LOSSES AND COTTON SALVAGE HANDLING

16. In the event of loss and upon receipt of advice thereof by the assured immediate notice shall be given to this company, and this company shall be at liberty to investigate the circumstances attending same and ascertain the amount of loss without such action operating to waive any forfeiture or admit any liability, but all claims to be payable after the expiration of fifteen days from receipt of such notice, provided satisfactory proofs have been filed.

17. It is agreed that this company shall have the right at all reasonable times to inspect the compresses specified herein and the assured will use their best efforts to have carried out necessary improvements for protecting any compress against fire, and to supply any deficiencies in the same, which this company may deem essential.

18. Other insurance permitted without notice until required. Other insurance, if any, shall be deemed concurrent with this insurance and shall contribute pro rata in the payment of any loss.

Attached to and forming part of Policy No.....of the.....

This policy expires on the first day of September, 191.....

.....Agent.

Form 304.

TRANSPORTATION LINES LIABILITY IN COMPRESSES.

1. On their legal liability for loss or damage by fire to cotton in bales, to be declared by classes as hereinafter provided.

2. This insurance covers the legal liability of the assured as Common Carriers or Warehousemen, for loss or damage by fire to the classes of cotton herein described as "A," "B," "C" and "D," while in the custody of the hereinafter named compress company or companies; all while contained in any of the compresses, sheds, platforms, and/or yards on their premises and on grounds immediately adjacent thereto and in or on cars on switch tracks of said compress company or companies situate at and known as:

3. A. On Outbound Cotton in bales originating at the point of compression, for transportation by the assured, while in the custody of any of said compress companies for the account of the assured, for which bills of lading have been signed by their duly authorized Agents or compress receipts exchangeable by their terms for bills of lading have been issued.

4. B. On Outbound Cotton, under shipping instructions tendered the assured for transportation, while in the custody of any of said compress companies for account of the assured, loaded and/or being loaded, for which cotton no bill of lading or compress receipt, exchangeable by its terms for a bill of lading, has been issued.

5. C. On Inbound Cotton, carried by the assured on local bills of lading issued by it, or by its connections, consigned to "Shipper's Order" and held in the custody of any of said compress companies, for account of the assured, until surrender of bills of lading.

6. D. On Transit Cotton stopped for the purpose of compression, while in the custody of any of said compress companies for the account of the assured, to-wit—cotton carried by the Railway Company under through bills of lading and unloaded at compress for compression, for which bills of lading of the assured or its connections have been issued at some point other than the point where the cotton is stopped for compression and consigned through to destination beyond such compress point.

7. It is understood and agreed by this Company that unintentional omissions and/or errors on the part of the assured in reporting cotton, in accordance with the requirements of this policy, as hereinafter provided, do not vitiate this insurance and the assured agrees to pay premium, at the rates agreed, on all cotton not reported through such omissions and/or errors; it is specifically understood and agreed, however, that the intentional omission to report any cotton which should be included in any one or several of the classes herein described as "A," "B," "C" and "D," at any one or more compresses shall render null and void the insurance herein granted on the particular class or classes from which said cotton was purposely omitted at such locations.

8. THIS COMPANY SHALL NOT BE LIABLE FOR MORE THAN.....
.....DOLLARS by any one fire at any one compress.

9. It is hereby agreed that the existence of a chattel mortgage covering the cotton itself shall not constitute an avoidance of this policy.

10. The assured agrees to report, or have the compress company or companies named herein report, the number of bales on hand for the account of this assured when this policy takes effect and thereafter report daily to

- (1) The number of such bales on hand at last report.
- (2) The number of such bales received during the day.
- (3) The number of such bales shipped out during the day.
- (4) The number of such bales remaining on hand.

12. The assured agrees within 15 days after the close of each month to pay to this company the agreed premium for this insurance for the preceding month.

THE FIRE INSURANCE CONTRACT

13. It is agreed that the insurers, by a properly authorized representative, shall be permitted to examine the books of the assured and/or any and all of their agents and employees, at least once every month for the purpose of verifying the accuracy of the returns made under this policy.

14. This company shall not be liable for more than the actual cash value of the cotton at the time of the loss and at the place of the fire, which cash value shall in no event exceed what it would then cost to replace same, plus all customary shipping charges, with cotton of like kind and quality.

15. It is agreed that the liability of this company for any loss under this policy is limited to the percentage of the value of any one bale which the amount of this policy bears to the total insurance at the time of the fire, and the assured agrees to maintain insurance to the full value of each and every bale, or be a co-insurer for the deficiency.

16. In the event of loss and upon receipt of advice thereof by the assured immediate notice shall be given to this company and this company shall be at liberty to investigate the circumstances attending same and ascertain the amount of loss without such action operating to waive any forfeiture or admit any liability, but all claims to be payable after the expiration of fifteen days from receipt of such notice, provided satisfactory proofs have been filed.

17. It is agreed that this company shall have the right at all reasonable times to inspect the compresses specified herein and the assured will use their best efforts to have carried out necessary improvements for protecting any compress against fire, and to supply any deficiencies in the same, which this Company may deem essential.

18. Other insurance permitted without notice until required. Other insurance, if any, shall be deemed concurrent with this insurance and shall contribute pro rata in the payment of any loss.

Attached to and forming part of Policy No.....of the.....

This policy expires on the first day of September, 191.....

.....Agent.

RAILWAY TRANSIT COVER.

On cotton in bales on or in depots, freight houses, platforms, yards, piers and bulkheads and/or in closed cars in transit, at rest or in motion, while in custody of the assured
.....
as common carriers or forwarders.

This insurance covers the legal liability of the assured on all cotton received by them for transportation, and attaches from the time the cotton comes into the possession of the assured and terminates on its delivery to the consignee and/or to the succeeding carrier.

It being expressly understood and agreed that this insurance does not attach to cotton while in Compresses, or while in the custody of Compress Companies, nor on or in open cars at rest or in motion, and that this Company shall not be liable under this policy for loss at any one fire in excess of Dollars,
.....
.....

In consideration whereof the assured agree to deliver to this company within ten days after the close of each month a sworn statement showing the total number of bales received by them during the month preceding, and to pay thereon a premium of.....Cents per bale, the statement for the first month to include the number of bales in their possession at the time of the issuance of this policy, viz:.....

It is further agreed that this Company shall at all reasonable times be permitted by its authorized representative to examine the books of the assured at their chief offices or elsewhere for the purpose of verifying the correctness of the statements rendered from month to month.

COTTON LOSSES AND COTTON SALVAGE HANDLING

SPECIAL CONDITIONS

It is understood that this entire Policy is subject to the following special construction, to-wit: It is intended to indemnify the assured under this Policy, against all loss or damage by fire, including loss of freight, dues, back charges, charges, advances, liens and claims upon such cotton, including earned freight charges up to point of occurrence of loss, their own or against, or on which the assured, may have any claim or lien, or as to which they may be under any legal liability, provided however, that this Company shall not be liable for exceeding the actual cash market value of the cotton immediately preceding the fire, which cash market value shall in no case exceed what it would then and there cost to replace same with cotton of like kind and quality.

It is further understood and agreed, that while in case of loss hereunder, the assured shall give immediate notice thereof to this Company, the time for making the statements required in the Policy is hereby extended to not exceeding six months from date of fire.

In case of claim made by any owner against the assured, for loss upon cotton in the possession of the latter, such claim, together with the facts concerning same, in the knowledge of the assured, shall be submitted to this Company, which shall thereupon elect whether to admit such claim, or to have same contested at its own expense, reserving to the assured, however, the right to pay any claim (for which the assurer does not admit the liability of the assured), and at their own risk to attempt to recover the payment of the same under this Policy by suit at law, or otherwise, from the assurer.

The following permissions are allowed under this Policy, viz:

To use wood and coal for fuel in locomotives.

To alter, enlarge, repair or rebuild any building, or other structures, as the interests of the insured may require.

Permission is hereby granted the assured to effect other insurance without prejudice to this insurance, and the same shall be held contributory with the amounts insured hereunder, provided, however, that if other insurance shall be effected, this Company shall nevertheless receive the full premium named above for each bale coming under the protection of said Policy.

Permission granted to handle and store such freight and merchandise, to do such work and to use such materials as may be necessary and incidental to their business, to use oil, gas and electricity for light and power.

This Policy is issued upon the condition that no claim hereunder for loss or damage by any one fire shall be payable, unless after adjustment in accordance with its terms, conditions, and limitations such loss shall amount to the sum of One Hundred Dollars or over anything contained herein to the contrary notwithstanding.

Attached to and forming part of Policy No. of the
Insurance Company of

..... Agent.

SAMPLE FORM BANK GUARANTEE.

New Orleans, La., Jan. 1, 1915.

To the Cotton Insurance Company, Ltd.,
100 South William Street,
New York City.

Dear Sirs:

As collateral for advancement made to John Doe & Company we look to your Policy No. 74562 which purports to insure the said John Doe & Company against loss to cotton as therein specified, and whereas said policy provides that any loss thereunder is payable to the Bank or Bankers, or other parties having made advances on said cotton, so far as their interest may appear, provided you receive written notice of such interest within ten days after the loss occurs.

THE FIRE INSURANCE CONTRACT

Now, therefore, in consideration of your making an advance loan within said ten days of (\$20,000) Twenty Thousand Dollars to the said John Doe & Company and this Bank on account of said cotton destroyed or damaged by fire occurring on May 1st at I. C. R. R. Company's Warehouse No. 1 at New Orleans, Louisiana, the Marine Bank does hereby agree to protect you and hold you harmless from any and all claims made against you by any other Bank or Bankers or other parties claiming any interest in the said cotton by reason of said fire and said advance payment of \$20,000 on the 400 Bales of Cotton evidenced by the receipts issued by the said Illinois Central Railroad Company and other documents attached to draft on you of this date covering payment of said \$20,000 to order of John Doe & Company and the Marine Bank.

Yours very truly,

XXVI
FIRST SECTION
**APPORTIONMENT OF LOSSES UNDER NON-CONCURREN-
T POLICIES**

**W. N. BAMENT, General Adjuster The Home Insurance
Company**

This subject has been one of absorbing and ever increasing interest ever since the contribution clause came into general use as a policy condition and even before. It has commanded the attention of the courts as well as that of the best legal and lay minds in the fire insurance business for nearly a century, and although many rules have been devised for the apportionment of losses where policies are nonconcurrent, no rule of universal or even general application has been found and the prospect of discovering the philosopher's stone is as remote as ever.

What is the "whole insurance" upon the property covered, or on the items damaged, when both specific and general policies are involved? Shall the blanket policy contribute with one specific policy and in remainder with another and so on all down the line, or shall it be distributed on the various classes in the ratio of value, the ratio of loss, or in some other manner? What effect should the presence of a co-insurance or average clause in one or more nonconcurrent policies have upon the apportionment? No satisfactory answer to these questions has ever been given.

All the courts which have passed upon the question have held that the first requisite of any method of apportionment must be the insured's protection to the full extent of his rights under his policies and any method, which in a given case fails to afford him this just measure of indemnity, must give place to another that will.

This is eminently proper, because other insurance is taken out by the insured for his own benefit and not for the benefit of co-insuring companies. He pays the premium and consequently it is his interest which should be the prime consideration. The benefit accruing to co-insuring companies is and should be regarded as a piece of good fortune and merely incidental; but as each policy is an independent contract, it should be construed in the light of reason without doing violence to any of its provisions.

Almost all of the well known rules of apportionment were devised long before that evolutionary product of the insurance busi-

THE FIRE INSURANCE CONTRACT

ness—co-insurance—made its appearance, and although some of them served reasonably well in many instances as means to an end, the question has been so affected by co-insurance conditions that all the older rules have in a large measure lost what merit they possessed as practical working propositions.

As it has seemingly been impossible to find any rule of apportionment of general application, it follows that it would be equally impossible to prepare a contribution clause which would satisfactorily meet all conditions, hence the present brief form, in view of the general inclination of the courts to construe it along reasonable and equitable lines, is probably as good as can be devised, except that possibly some amendment might be made in order to meet situations growing out of co-insurance or reduced rate average clause conditions.

SIMPLE NONCONCURRENCE

In cases of simple nonconcurrence, the law is apparently settled. Where there is a loss on one item only, the full amount of the blanket or general policy must contribute with the specific toward the payment of the loss. *Page Bros. vs. Sun. Ins. Office*, 74 Fed. 203, 20 C. C. A. 397. In that case the court used this somewhat striking sentence, "This contract is too plain to permit construction, too positive to allow evasion, and too clear to admit of doubt."

When there is a loss on two items, one of which is covered by a specific policy, and there is also a blanket policy covering both, the latter must first pay the loss on the extraneous item and then contribute in remainder with the specific. *Cromie vs. Kentucky and Louisville Ins. Co.*, 15 B. Mon. 432 (Ky. 1854).

To the minds of some, both these rules place too great a burden upon the blanket policy, but the argument of the court in the *Page Bros.* case (*supra*) in support of the first, emphasized as it is by the decision of the Court of Appeals of New York in the case of *Farmers' Feed Company vs. Scottish Union & National Insurance Company*, 173 N. Y. 241, and the Supreme Court of Wisconsin in the case of *Stephenson vs. Agricultural Insurance Company*, 116 Wis. 277, 93 N. W. 19, both of which decisions, singularly enough were rendered the same day, seems to be unanswerable.

The second rule has not received universal endorsement. If, say its critics, it be admitted that there must be some division of

APPORTIONMENT UNDER NON-CONCURRENT POLICIES

the blanket policy, the question might easily arise whether that division should be made by setting aside as covering on the extraneous item an amount just sufficient to pay the loss thereon, and apply the remainder to contribute with the specific policy as in the *Cromie* case, (*supra*) or whether some other division might not or should not be made. This thought seems to have been in the mind of Chief Justice Marshall, when in the *Cromie* case, he expressed grave doubt whether, on account of the continuing liability of the blanket policy on the undestroyed property, and the possibility of a later loss thereon, the Court had not made that policy contribute with the specific for too great an amount. If he could have anticipated present-day co-insurance conditions, he would, through his seeming solicitude for the interest of the insured, doubtless have discovered another reason for a different subdivision of the blanket policy, for, while the *Cromie* rule points an absolutely sure way of giving the insured the maximum indemnity to which he is entitled in every instance in the absence of co-insurance, yet it has exactly the opposite effect in many cases when co-insurance conditions prevail.

Although it is conceivable that the co-insurance necessities of the insured may have some influence upon future decisions in cases of compound non-concurrence, good arguments can be advanced against their doing so in cases of simple non-concurrence.

According to the plain reading of the contribution clause, the specific insurer is entitled to contribution from the full face of the general policy. The courts, however, declare that full contribution will not be accorded if there be a loss on an extraneous item, and hold that the loss thereon must first be cared for by the general policy. If, therefore, the specific insurer consents to a modification of the clear, unambiguous phraseology of the clause to the extent of permitting the general policy to first pay this extraneous loss, it meets the situation fairly, and cannot be deprived of contribution from the remainder, without doing unreasonable and inexcusable violence to the contribution provision.

When there is no loss on any other item, there is nothing to deduct from the blanket policy, and the specific is consequently entitled to contribution from its full face.

The *Page Bros.* decision (*supra*) is so fundamentally sound as to preclude discussion. The *Cromie* decision has stood the test for over sixty years and its underlying principle has never been

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successfully asailed or seriously questioned; hence, it is entitled to be regarded as a fixed rule, universally applicable in cases of simple non-concurrence.

If these two decisions are fundamentally sound when the policies do not contain co-insurance or reduced rate average conditions, they are equally sound when such conditions are present. These provisions neither increase nor diminish the amount of the policies containing them, nor in any way affect the "whole insurance" on the property; hence they should not be permitted to have any influence whatever upon the contribution clause, so long as it retains its present phraseology. Apportionments, however, are always subject to the limit of liability of all policies under their respective conditions of co-insurance or average.

Such extraordinary liberties, however, have been taken with the contribution provision from the time of its birth, and it has been disfigured by the experts and the courts in such a variety of ways, as to leave one in doubt whether there is any limit to which they will not go in that direction, in order to meet the necessities of the insured. But when all is said, it would seem that the argument advanced by the Court in the Farmers' Feed Co. case (*supra*) that the insured should stand a portion of the loss himself in a certain contingency, because he virtually agrees to do so—should apply to cases of simple non-concurrence as well as to those where the policies are concurrent.

COMPOUND NON-CONCURRENCE

It is in cases of compound or interlocking non-concurrence where two or more subjects which are covered by specific policies are also embraced within the cover of blanket policies, or where they interlock, that the principal trouble arises.

Some adjusters entertain the view that in cases of non-concurrence, simple or compound, when it is found that the sum of the co-insurance or average clause limits of the various insurers is less than the total loss, each company should pay the amount of its limit, and that no attempt at an apportionment should be made. And if the sum of the co-insurance or average clause limits exceeds the total loss, as they frequently do, there should be deducted from each maximum limit its pro rata proportion of the excess loss in order to arrive at the net liability of each group of policies.

APPORTIONMENT UNDER NON-CONCURRENT POLICIES

This view is evidently based on the following line of reasoning: Rates at the present time are quite generally predicated upon the use of the 80, 90 or 100 percent average or co-insurance clause. The insurers, in effect if not in fact, say to the insured: "If you will carry insurance to the extent of 80, 90 or 100 percent of the value of the property, as the case may be, and thus give us the benefit of that contribution in the event of loss, we will be satisfied, provided, of course, you are not overpaid." In cases of compound non-concurrence where all policies contain the average or co-insurance clause, and the same is operative in all, where the aggregate insurance equals or exceeds the required percentage of the aggregate value, the insured should be entitled to collect his loss up to, but not exceeding, the co-insurance limit of each. If average or co-insurance conditions are complied with, the insured will have done all that was contemplated either by himself or the insurers when the policies were issued, and each company should be content if the amount apportioned to it does not exceed its average or co-insurance limit.

It will be observed, however, that the theory or rule above outlined is virtually the same as apportioning the total loss on all items on the basis of the average or co-insurance limits, instead of the face of the policies, and is in direct conflict with the principle laid down in the *Farmers' Feed Company* and *Stephenson* cases, (*supra*). In considering this question, we must take the insurance contract, not as it might, could, or should be, but as it is; and the contribution clause therein, although it has been distorted almost beyond recognition, is entitled to at least a rational construction.

In the case of *Buse vs. National Ben Franklin Insurance Company et al.*, 161 N. Y. Supp. 566 (1916) the Supreme Court of New York, Erie County, applied the above principle in the apportionment of the loss. The old New York Standard Policy under which this loss occurred, lines 98 to 100, contains the following stipulation:

"and the extent of the application of the insurance under this policy or of the contribution to be made by this company in case of loss, may be provided for by agreement or condition written hereon or attached or appended hereto,"

and the court evidently concluded that by reason of this provision the average clause superseded the contribution clause of the policy, the latter having been omitted from the average clause. The Court

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also seems to have ignored the decision in the Farmers' Feed Company case (*supra*), evidently distinguishing the two cases by reason of the fact that in the former the policies were non-concurrent, while in the latter they were concurrent. The case was not appealed probably on account of the smallness of the amount involved, hence we do not know what views the Court of Appeals may entertain on the subject.

It should be stated that the Farmers' Feed Company case is also distinguishable from the Buse case from the fact that in the former a part of the insurance did not contain the average or co-insurance clause, whereas in the latter case all the insurance was subject to co-insurance conditions.

Many ingenious methods of apportionment have been suggested, among which may be mentioned the Finn-Griswold-Kinne rule, the Connecticut or Gradual Reduction rule, the Reading, the Albany, and the Rice rules, and the later inventions, the Morristown and Giesse rules (so named on account of the modesty of their authors), all of which have been weighed in the balances and found wanting.

Each of these rules has had its strong advocates and also its hostile critics. The number of court decisions bearing on the subject are comparatively few, and there is quite as great a diversity of opinion among the experts as there is among the courts; in fact, there has probably been no court decision rendered which did not have its inception in the mind of some insurance adjuster.

Probably the best and most exhaustive discussion of the subject which has ever appeared, is that contained in a paper read by the late E. F. Rice, adjuster of the Aetna Insurance Company, before the Underwriters' Association of the Northwest, and published in the proceedings of that organization in 1880. He reviewed and carefully analyzed all the decisions and the views of text writers and experts up to that time, and clearly demonstrated that none of the methods which had been devised were theoretically sound or universally applicable. He showed by concrete examples that under the then known rules of apportionment, which made a division of the blanket policy, if the amount of gross loss were increased, the liability of the blanket policy might be diminished, and he rightly argued that any rule which would admit of a really bright adjuster increasing his company's salvage by magnifying the loss must be fallacious in principle. Mr. Rice invented an ingenious rule of his own, to which reference will be made later, and

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evidently thought he had at last found something which would withstand the criticism which he had directed against the older theories, but alas, Mr. Rice's own rule succumbed to the same test. The Kinne rule had not at that time made its appearance, but being an offspring of the Finn rule, it cannot withstand the test applied by Mr. Rice any better than the others.

THE READING RULE

This, briefly stated, provides for a division of the blanket policy among the various items of property in the ratio of values, for purposes of contribution.

This rule was used by the Supreme Judicial Court of Massachusetts in 1858 in the case of *Blake vs. Exchange Mutual Insurance Company*, 12 Gray 265, and again by the same court in 1913 in the case of *Taber vs. Continental Insurance Co. et al.*, Vol. 42, *Insurance Law Journal*, page 516, 213 Mass. 487. The same principle was also applied by the courts in New York and Vermont, *Ogden vs. East River Insurance Company*, 2 *Insurance Law Journal* 135, 50 N. Y. 388; *Chandler vs. Insurance Company of North America*, 70 Vt. 562, 41 Atl. 502. This rule will often fully reimburse the insured and do no real violence to the interest of any insurer, yet it will in many instances fail to give full indemnity, and unless modified by making the division only among the items involved in the loss, will work an injustice to the specific insurers.

The point most frequently urged against it, is that it imports into the blanket policy the average distribution clause, a condition which is foreign to it, thereby giving it a more favorable construction than it deserves, but the same objection can be urged with equal propriety against all of the other rules which call for a division of the blanket policy, and if the division were made only among the items involved in the loss, in the ratio of value, there would seem to be no logical reason why this method should be subjected to any greater criticism than the others.

This rule has had the endorsement of the courts of last resort, to which reference has been made (*supra*) but in the cases decided the interests of the insured were not adversely affected by its application. If conditions had been otherwise we can easily believe that the principle of the rule would have been rejected by these courts just as it has been by others.

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THE MODIFIED READING RULE

This rule divides the blanket policies among all classes of property, whether involved in the loss or not, so that when possible, and as nearly as possible the percentage of available insurance to value will be the same on each class as the percentage of total insurance to total value of all classes.

This differs from the original Reading rule in that it takes into consideration both value and insurance, and the relation of one to the other. Although it is not universally applicable, it will work reasonably well in a large number of cases when co-insurance conditions prevail.

THE ALBANY RULE

This much criticised and many times rejected rule, which was inserted as a condition in some policies fifty years ago, provides that if the insured shall have other insurance which includes the premises or property described, and such policy or policies shall at any time or under any circumstances or contingency be liable to the insured for any amount whatever, such policy or policies, as between the insured and the company, shall be considered as contributing insurance.

This condition was adopted because of the decision of the Court of Appeals of New York in the case of *Howard vs. Scribner*, in 1843, 5 Hill 298, wherein it was held that where there is both specific and blanket insurance the latter does not constitute "other insurance" and that the specific policy must pay in full without regard to the blanket policy. But this decision was overruled in 1872 in the case of *Ogden vs. East River Insurance Company* (supra). Strange as it may seem this antiquated doctrine still obtains in Pennsylvania, *Meigs vs. Insurance Company of North America*, 205 Pa. St. 378, 54 Atl. 1053. The Federal Court held to a contrary doctrine in another case (the Hill school case) growing out of the same fire, *Meigs vs. London Assurance Company*, 126 Fed. 781.

The Pennsylvania Court has certainly turned the tables on those who are imbued with the idea that no rule of apportionment is too good for the insured and the specific insurers, and none too harsh for the blanket policy. It swings the pendulum too far in the opposite direction, carries the doctrine of the conservation of

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the blanket policy beyond all reason, and entirely ignores the contribution clause in the specific policies. The Pennsylvania Court had rendered a similar decision in the case of *Sloat vs. Royal Insurance Company*, 49 Pa. St. 14, in 1865, and its adherence to the same doctrine fifty years later indicates that the Court is still joined to its idols. The position of the Pennsylvania Court is unsound, and it is not at all surprising that its opinion is never followed by other states and is ignored in practice within its own borders.

The Albany rule very frequently entails a loss upon the insured and does a flagrant injustice to the blanket policy. It has been in harmless disuse for many years, and no one in these days gives it serious consideration.

The courts, however, in the *Farmers' Feed Company* and *Stephenson* cases (*supra*) when construing the words "whole insurance" held that the amount of insurance is the largest sum that the company under any circumstances, according to the terms of the policy, can be required to pay and not the smaller sum which can be collected under special conditions, and according to these decisions the loss which accrues to the insured by reason of the co-insurance or reduced rate average clause in certain policies must be borne by him and cannot be transferred to the companies whose policies are otherwise concurrent but have no such clause.

Although the language used in these decisions is exceedingly broad, and notwithstanding the fact that both courts permitted the insured to suffer a loss under special conditions in the face of the fact that they carried full insurance, it is hardly to be supposed that they would stand for the principle of the Albany rule in a case of either simple or compound non-concurrence, but would on the contrary follow precedents and permit some equitable division of the blanket policy, for purposes of apportionment.

GRADUAL REDUCTION RULE

This rule is the one most popular among adjusters, particularly in the Middle West where it has been in use for many years, and it has less to commend it than any other with the possible exception of the Albany rule. It is unsound in principle, is always inequitable in its results, and possesses but one virtue and that is, in the absence of co-insurance conditions, it will more frequently indemnify the insured, unless reapportionment is resorted to, than any other rule. But this virtue is largely neutralized by the injustice

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it always does to the blanket insurers, and by its inevitable discrimination against certain specific insurers when their policies cover on different items. And if the blanket policy contains the reduced rate average clause, as it usually does, the rule will in many instances have just the opposite effect from that intended, because the liability of the blanket policy will be limited by the operation of the average clause, and the extra burden imposed upon it by the rule will be transferred to the insured.

The Gradual Reduction Rule was adopted by the Supreme Court of Errors of Connecticut in the case of *Schmaelzle vs. London and Lancashire Fire Insurance Company et al.*, 75 Conn. 397, 53 Atl. 863, 60 L. R. A. 536, 96 Am. St. Rep. 233, and more recently by the New Jersey Court of Errors and Appeals in *Grollmund vs. Germania Insurance Company*, 83 Atl. 1108. It was urged by the company having the specific policy in the recent Massachusetts case previously referred to, but was rejected by the Court. *Taber vs. Continental Insurance Company*, 213 Mass. 487, 42 Insurance Law Journal 516 (*supra*).

It makes the blanket policy contribute first for its full amount on the item where the loss is greatest, then in remainder where next greatest, etc., thereby, in all instances magnifying the contributing power of said policy, and in many instances transforming it as a factor in contribution into a policy several times its original amount. Why the imposition should start with the greatest loss instead of the next greatest or smallest is not manifest; in fact the Connecticut Court in the *Schmaelzle* case frankly admitted that the starting point was purely arbitrary, and intimated that the order of reduction might be determined by the highly intellectual and logical process of drawing lots. The ends of justice would probably have been served quite as well if the entire apportionment had been made in that way.

The *Schmaelzle* case has its ludicrous side. So absorbed were all the parties in the question of apportionment, that the fact that the blanket policy contained a co-insurance clause and that its maximum liability was absolutely fixed thereby was entirely overlooked. If this had been discovered, we would doubtless have had from the Court, instead of an argument in favor of the continuing gradual reduction of the blanket policy, a learned dissertation in favor of its conservation.

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In the Schmaelzle case all the blanket policies were concurrent and all specific policies were concurrent. In the Grollimund case the specific insurances were in the same company, so that these are not ideal cases with which to illustrate the absurdity of the "gradual reduction" principle as a practical working proposition. Let us take for example: \$10,000 specific insurance in Company "A" on building, \$10,000 specific insurance in Company "B" on machinery, and \$10,000 blanket insurance in Company "C" on building and machinery. Sound value of building \$15,000 and loss \$10,000. Sound value of machinery \$15,000 and loss \$9,999. No co-insurance conditions. Applying the Gradual Reduction rule commencing with the larger loss, Company "A" pays $10,000/20,000$ of \$10,000 on building, or \$5,000; Company "B" pays $10,000/15,000$ of \$9,999 on machinery, or \$6,666, and Company "C" pays \$8,333.

Conceding, of course, that the insured should be fully indemnified, and even conceding for the moment that the blanket policy should be penalized, what possible excuse can be given for making Company "B" with a policy covering for the same amount on an item with the same sound value and a smaller loss, pay \$1,666 more than Company "A"? Why this extraordinary discrimination in favor of Company "A"?

This apportionment, which is self-evidently arbitrary, does a three-fold injustice: First, to Company "B" which is made to pay a sum unconscionably out of proportion to that paid by Company "A"; second, to Company "C" in that it is treated as if it were a policy for \$15,000 instead of what it really is, one for \$10,000; third, to the insured by reason of the fact that his best insurance (the blanket) is unwarrantably depleted, and solely in the interest of one of the specific insurers.

If the 100 percent reduced rate average clause be inserted in the blanket policy and the Gradual Reduction rule be applied, Company "A" pays \$5,000, Company "B," \$6,666, Company "C," \$6,666.33 and the insured loses \$1,666.67.

This apportionment, if possible, is even worse than the other, for the discrimination against Company "B" still remains and the burden which, in the absence of the average clause is saddled on to the blanket policy, is transferred to the insured who loses \$1,666.67 in the face of the fact that he is fully insured.

It is argued by the advocates of the rule that if two or more independent fires occur, no matter how short the intervening time,

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the blanket policy will be gradually reduced by the first and by each succeeding fire, and in the payment of this series of losses its basis of contribution will in the aggregate exceed its face just as it does through the operation of the Gradual Reduction rule. That is quite true, but one loss is not two or more losses, and the amount of the blanket policy at the time of "any loss" is no more than its face. And there is no more warrant for magnifying it beyond that amount for purposes of contribution, than for loss paying purposes, and the latter is of course impossible.

The blanket insurer might easily be reconciled to having its policy gradually reduced and its contribution regulated by the course of events in the shape of a second or third fire which may never occur, but that is vastly different from having it gradually reduced and thereby greatly magnified as a contributing factor, by an arbitrary act in every single loss. The specific insurers might also cheerfully accept the results accruing from the order of events, whereas they might justly resent the discrimination which inevitably attends the operation of the Gradual Reduction Rule.

If three items are involved in a loss, six different combinations or orders of reduction are possible; if four items are involved twenty-four combinations are possible, and if five items, one hundred and twenty combinations, etc. Each one of these orders of reduction will produce a different result and neither is entitled to precedence over any other.

The rule always works an injustice to one interest, generally to two interests, some times to three interests; and any scheme of apportionment against which these indictments can be proven is indefensible.

THE FINN-GRISWOLD-KINNE RULE

The Finn rule which was first applied by its author in 1842 is substantially as follows: The contributive liability of the compound policy shall be based upon the loss, (instead of the value as in the Reading rule) in the proportion that the loss upon the specific property shall bear to the loss upon all of the property covered by the general insurance.

This rule which failed to fully indemnify the insured in many instances, was modified by Griswold and still further modified by Col. Kinne in the rule which bears his name, which is the latest and probably the final development of the loss to loss principle.

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It possesses the merit of being consistent with itself in that it is made applicable to cases of simple as well as to compound non-concurrence. Its first application sometimes fails to give the insured full indemnity, which necessitates a reapportionment, and sometimes, though seldom, a second reapportionment. The idea of reapportionment is repugnant to many, and to the minds of some there is a serious fracture of the loss to loss principle the moment this becomes necessary. The rule, in the absence of co-insurance conditions, through its provisions for reapportionment, will always give the insured the fullest indemnity to which he is entitled, but the Reading rule or any other rule will do the same if unlimited reapportionment is resorted to.

In point of popularity among adjusters the Kinne rule will take rank with the Gradual Reduction rule. It has been in use on the Pacific Coast for over thirty years and in 1910 the Fire Underwriters' Association of the Pacific adopted it for general use among the companies in that territory, and by some members of the fraternity there and elsewhere it is regarded as the last word on the subject of nonconcurrent apportionments, as is evidenced by the following quotation from a recent address delivered by a prominent adjuster, "There is only one equitable rule, that is the Kinne rule, loss to loss, with reapportionment from excesses to pay shortages."

The basis for this somewhat extravagant eulogy is not apparent. As a matter of fact the rule is simply one of several convenient makeshifts, none of which can lay claim to theoretical soundness any more than they can to general applicability. In addition to the criticism directed against its underlying principle by Mr. Rice, the Kinne rule will not only fail to fully indemnify the insured in many instances when co-insurance is present, but will come about as far from doing so as almost any other known rule, hence under present day underwriting conditions, it fails in the one point which of all others was chiefly instrumental in bringing it into being.

Some who favor the Kinne rule in preference to the Reading rule do so on the ground that the latter is too favorable to the blanket policy, evidently overlooking the fact that some times the reverse is true, and not infrequently the Kinne rule penalizes it less than the Reading rule.

THE MODIFIED FINN RULE

As the modified Reading rule is sometimes used when co-

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insurance conditions are present, so the modified Finn rule is occasionally used when those conditions are absent. It divides the blanket policy among the various classes of property so that when possible, and as nearly as possible, the ratio of available insurance to loss will be the same on each class as the total insurance is to the total loss on all classes.

The difference between the modified and the original Finn rules is similar to the difference between the modified and the original Reading rules; it takes into consideration both loss and insurance, and the relation of one to the other.

There is of course no authority in the policy for such arbitrary divisions and they could not stand if their result proved to be to reduce payment to assured.

THE RICE RULE

According to Mr. Rice's rule, if the aggregate loss is less than the aggregate insurance, and the loss upon each subject covered by the specific insurance is less than the specific insurance plus the whole insurance available to pay the loss, there is contribution, as between the specific and collective policies, and every policy should enjoy a proportional abatement of liability. And the loss, if any, for which the general policy alone is liable, having been provided for, the insurance remaining under that policy should be apportioned for contributive purposes among the various subjects in the proportion that the maximum overinsurance on each bears to the aggregate overinsurance on all collectively.

By maximum overinsurance on each item is meant the excess of insurance over and above the loss on each item ascertained by adding the full face of the blanket policy to each of the specific policies. The Rice rule virtually makes an apportionment of the salvage in the ratio of the overinsurance. It is ingenious but, as has been pointed out, it is open to the same objection that Mr. Rice directed against the older well-known rules, that is, if the total loss be increased, the payment of some insurer may be diminished.

THE GIESSE RULE

This rule takes its name from the case in which it was first applied and is quoted verbatim:

"First find the limit of liability of each class of insurance under the average or co-insurance clause, and find the total of those limits

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(which will usually be somewhat greater than the aggregate loss) by adding them together; then find what each class would pay if it got the full benefit of its contribution clause, i. e., contribution from the face or full amount of all other insurance covering the whole or any part of the property which itself covers, and find the total of these amounts (which of course will be less than the aggregate loss) by adding them together. We thus find the most each class can be made to pay, and also the least it can possibly get off for. Add the several differences between these pairs of limits, find what proportion of that total the aggregate excess of the upper limits over the aggregate loss constitutes, and deduct that proportion of each of the differences from the respective upper limits, to find what each class of insurance shall pay to make up the loss."

This rule was devised for use under reduced rate average or co-insurance conditions, and is of course not universally applicable. A great deal of ingenuity was displayed in its preparation, but as the basis upon which the lower limits are fixed is unsatisfactory, it follows that the result must be equally so in many instances.

THE MORRISTOWN RULE

This rule is so named because of the fact that it was while adjusting a loss at Morristown, New Jersey, that the author received his inspiration.

The basis of this rule is the same as the lower limits, as fixed by the Giesse rule, the aggregate of which will be less than the loss. The deficiency is distributed among the various policies pro rata until each reaches its co-insurance or other limit of liability. Inasmuch as the basis is the same, it is subject to the same criticism as the Giesse rule. Furthermore, if in attempting to take care of the deficiency in the manner prescribed, the co-insurance limits of certain policies are reached, and a portion of the loss still remains unpaid, no arrangement is made for taking care of the deficit, and hence the rule frequently fails to fully indemnify the insured.

CONCLUSION

That the foregoing observations are mainly critical rather than constructive is due to the fact that virtually every conceivable phase of the question has been considered by the brightest minds that the business has produced, and although they have not led us out of the Wilderness into the Promised Land, the methods suggested by them have been utilized in solving all the intricate questions in apportionment that have arisen up to the present time, and too much credit cannot be accorded them for the study they have given, and for the efforts they have put forth in the attempt to perform the seemingly impossible task of finding a rule of universal application.

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The question still confronts us; most of the rules possess some merit as means to an end, but as the experts and the courts have never agreed upon a uniform and clearly defined method of apportionment—and probably never will—and as all of those in use are arbitrary, that rule should be applied to each specific case which will come nearest to doing substantial justice to the respective insurers, and at the same time give the insured the fullest indemnity to which he is entitled under the most generous interpretation, within reason, of the various contracts.

Judge Ostrander, in his well-known work on insurance says: "Cases are sometimes presented where the complications defy human understanding. When this occurs—when reason is baffled and mathematics fail—arbitrary action becomes a necessity. The knot we cannot untie must be cut."

SECOND SECTION—CHAPTER XXVI APPORTIONMENT OF COMPOUND NON-CONCURRENT INSURANCE

ALLEN E. CLOUGH

The Limited Liability Rule is only suggested for cases where coinsurance or average conditions appear in all policies, and it has been in constant and satisfactory use for the past ten years in New York City, where essentially all policies are subject to the average clause. The need for a rule which under all conditions for which it is intended will give substantial justice to the assured and the insurance companies is commonly admitted.

This rule follows the theory of the English rule of apportionment on the independent liability principle, which is explained at length with the arguments therefor in Welford & Otter-Barry's *Fire Insurance*, chapter on Contribution and Average (pps. 339-349 and 353, para. 2).

LIMIT OF LIABILITY RULE

For application to compound nonconcurrent apportionment, i. e., where there are involved in the loss at least two kinds of specific as well as blanket insurance, all subject to average or coinsurance conditions.

The sound value of and loss on property insured by each class or kind of insurance having been determined, first find the limit of liability under each class or kind of insurance, whether a single

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policy, or group covering concurrently. An average or coinsurance clause operation will determine the limit of the class or kind of insurance where it applies; where there is sufficient insurance to value, or loss exceeds amount of insurance required under coinsurance clause, the limit will be determined either by the amount of the loss or the amount of the insurance, whichever is the smaller.

The sum of the limits thus determined is the whole insurance applying. If this sum is in excess of the whole adjusted loss, use this as the basis for a pro rata apportionment. If the sum of the limits of liability is less than the whole loss it is evident that payment by each company must be its maximum individual limit of liability, on the principle that the greatest possible collectible loss is due the assured.

If it should happen that the insurance (blanket and specific) on any certain group of items is charged with a payment in excess of the actual loss on the group, it is obvious that this excess over the actual loss must be reapportioned to the other insurance. Deduct the excess pro rata from one group, and add it pro rata to the other insurance. If this should result in charging any group of insurance with more than its limit of liability, the excess above the limit would have to be apportioned a third time to any groups having unexhausted limits of liability.

It is claimed that when coinsurance conditions appear in all policies, the contribution clause in the policy "This company shall not be liable under this policy for a greater proportion of any loss on the described property * * * than the amount hereby insured shall bear to the whole insurance * * * covering such property" should not be read, as it seems to be so commonly, by adjusters, as if it stood alone and not modified by "and the extent of the application of the insurance under this policy or of the contribution to be made by this company in case of loss, may be provided for by agreement or conditions written hereon or attached or appended hereto" (lines 96-100 policy of 1886) and as provided by (lines 72-77 and 101-105) 1917 policy; "Added clauses,—The extent of the application of insurance under this policy and of contribution to be made by this company in case of loss or damage * * * may be provided by agreement in writing added hereto"; "Pro rata liability,—This company shall not be liable for a greater proportion of any loss or damage than the amount hereby insured shall bear to the whole insurance covering the property, etc."

The cover of all policies is only "to an amount not exceeding" and it is suggested that if by terms of agreement or conditions written into the policy it actually covers or is liable for a less amount than its face, such reduced amount is really the whole insurance, for the application of the contract is wholly dependent on "at the time of the loss or damage," not what the liability might have been at some other time and under other circumstances.

It is argued against this view of the whole insurance that the court in the case of Farmers' Feed Company vs. Scottish Union and National held that in the circumstances of that case the face of the policies was the whole insurance, but the Farmers' Feed Company case is distinguishable from the fact that a part of the insurance did not contain the coinsurance clause, although *otherwise concurrent*. The Scottish Union and National, whose policy did not contain the coinsurance clause, sought to enforce contribution from the other companies and it was held to rightly rely upon the general contribution clause. The court upheld the validity of the general contribution clause for the company which had not varied its cover by an additional agreement and also upheld the lower payment by the insurance which had limited its liability by attachment of the 80 percent coinsurance clause.

It is on the theory that the contribution clause is specific authority for the use of the coinsurance clause that the New York courts have recently decided that the coinsurance clause is valid. (*Aldrich vs. Great American Insurance Company*, S. C. Ap. Div. N. Y.). This coinsurance clause expressly stipulates that the company shall be liable for no greater proportion than the amount insured bears to percent of the actual cash value of the property described; other forms add, nor for more than the proportion which the policy bears to the total insurance thereon. The inference is of course that the company is liable for whichever shall prove to be the lesser of these two amounts. Now, if through this coinsurance clause the liability of a policy is less than its face and this is true with reference to other policies on the risk, if it is further true that the loss is less than the coinsurance limit of liability or if it is true that the insurance is less than the loss, do not the conditions of the policies limit their liability in accordance with the facts as above mentioned?

Therefore, is it not proper in accordance with the conditions in any case, where all policies are subject to the coinsurance and there is compound non-concurrence, to use the coinsurance limit of

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liability, the loss or the face of the insurance, under the conditions above named, as the component parts of the total limit of liability under all the insurance. Surely, the limits so arrived at are the maximum amount which the assured could collect. They give him the most favorable construction of his insurance contracts. This method of apportionment has been twice supported in New York by judicial construction, in the City Court of New York (*Cosmopolitan Bank vs. Vulcan Insurance Company*) and in *Buse vs. the National Ben-Franklin* (*Insurance Law Journal*, Vol. 48, p. 404).

This rule is based on three principles:

1. The limit of liability expressly agreed to in the coinsurance (average) clause;
2. The liability does not exceed the loss;
3. The liability can not exceed the face of the policy.

The aggregate limits may be determined by any one or more of the above principles as they may be applicable in accordance with the facts, as stated in the rule.

The independent limits of each policy, or of insurance if certain of the policies are concurrent, become component parts of the whole limit of liabilities (sum of the limits) of all of the insurance. These are then subject to the pro rata clause.

Critics say that, admitting the propriety of pro rata apportionment on the coinsurance limits of liability when the coinsurance is operative as to all policies, they hesitate to accept limits set by this rule (when the coinsurance clause is not operative) by the amount of the loss or amount of the insurance. This feature is touched on above. It is not feasible to add to the policy conditions sufficiently to make them apply in all conceivable, and often seemingly, inconceivable, variations of non-concurrencies which result from careless or incompetent policy form writers. The courts properly insist that the assured must be protected to the utmost allowed by the policy contracts and that ambiguities in them must be resolved in his favor; if the insurance companies are not asked to pay more than their pro rata shares of their individual liabilities they should not complain. It is not the perfect rule which will equitably resolve *all* compound non-concurrencies, but within the limited scope suggested, where coinsurance conditions are present in all policies it is the nearest approach to the philosopher's stone sought, but only to transmute elements it is suited to; for these it is an easily un-

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stood and worked rule. After being tested in some hundreds of cases its use is recommended as yielding substantial justice and it *always* meets the consistent mandate of all courts, that the assured should have his insurance so applied as to give him the largest recovery possible under the terms and conditions of his policies. Note the equity of this rule in its application to the example cited on p. 549, Chap. 26. If all policies are subject to 100 percent or any other average (coinsurance) clause, each \$10,000 policy pays the same amount as in equity it should.

The following cases are taken from practical applications of this rule:

(1)	Military Goods)	Value	Loss	Insurance 80%	
	Umbrellas and)	\$2100.	\$1625.	\$3000. A)	
	Leather Goods)				
	Merchandise)				
	other than)	1150.	925.		\$1000. B
	above)				100%
	Fixtures)	300.	100.	300. C)	
				Limits and Payments.	
		3000 × 1625.	\$1625.	A—Limit fixed by loss	

80%	2100	=	1680		
			<u>300</u>	×	100.
80%	300	=	<u>240</u>		100. C—Limit fixed by loss
			<u>1000</u>	×	2650.
				=	746.47 B—Limit fixed by avg.
100%	3550	=	<u>3550</u>		clause

	<u>\$2471.47</u>
Assured	178.53
	<u>\$2650.00</u>

- (2) A—Policies cover pro rata—
 { \$1000. specific on horses with limitation
 { as to value on each of \$150.
 { 1500. specific on wagons with value of
 { each limited to \$150.
 { 500. blanketing, carriages, wagons and
 { harness.
 B—Policy covers blanket on horses, carriages and wagons with value
 of each horse limited to \$250.
 C—Policy cover \$2000. specific on horses not limited as to value and
 1000. blanket on carriages and wagons.

	Value	Loss	Insurance
Harness	\$ 485.	\$175.00	)
Carriages	3250.	350.00	)\$1000.))\$500.
Wagons	400.	75.00	A \$1500.) C)\$1000.) A
Horses	*2400.	*300.00	AC 3000.) B

*\$200. on 1 horse. \$50. each on two others.

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	Limits and Companies Pay	
On Wagons—the limit is the loss		\$ 75.00
On Horses —the limit is the loss		283.33*
Limit fixed by average clause—		
On carriages and wagons	\$1000. × \$425.00	145.55
	<u>2920.</u>	
On carriages, wagons and horses	1000. × 725.00	149.79
	<u>4840.</u>	
On harness, carriages, wagons	500. × 600.00	90.69
	<u>3308.</u>	
		<u>\$744.36</u>
Assured contributes		155.64
		<u>\$900.00</u>
*A policies pay one-third of \$250. on account of limit of \$150 on each horse.		
*C policy pays two-thirds of \$300. there being no limit on each horse.		
A	\$3000.	\$249.02
B	1000.	149.79
C	3000.	345.55
	<u>\$7000.</u>	<u>\$744.36</u>
Assured contributes		155.64
		<u>\$900.00</u>

If the persons responsible for placing this set of policies had been trying to present a trick problem in apportionment and an extreme example of failure to collect the loss in spite of adequate total insurance, they could not have done better than in this case. The problem would be almost impossible of solution were it not for the limit of liability rule, the application of which is easy and the result produced, we believe, cannot be challenged. It will be observed that each of the five groups of insurance is charged with its limit of liability which leaves an uncollectible loss of \$155.64, the aggregate liability under the policies being \$744.36. With the specific items on wagons and horses the limit of liability in each case is the loss, but the collection on horses under certain policies is on the basis of a valuation on any one not to exceed \$150. With the blanket items, the limit of liability in each case is fixed by the operation of the 80% average clause.

(3)

- A Policies cover stock of woolens out of safes.
 - B Policies cover general stock out of safes.
 - C Policies cover stock in safes.
 - D Policies cover blanket on stock in and out of safes.
- All subject to 80% average clause.

	Sound Value	Loss	Insurance	
Stock of woolens) out	\$ 4024.80	\$2096.45	A \$1500.)	)
) of			) \$10500.)	)
Other stock) safes	8809.24	4880.91	) B)	\$6500.
Stock in safes	10012.60	729.34	C 4000.	) D
	<u>22846.64</u>	<u>\$7706.70</u>		)
Stock in and out of safes				)

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			Limits	Companies Pay
		1500×2096.45 equals	\$ 976.66	\$ 680.61
A	80% of \$4024.80 =	3219.84		
B	There being sufficient specific insurance to comply with average clause conditions the loss is the limit			
		4000×729.34 equals	6977.36	4862.32
C	80% of \$10012.60 =	8010.08	364.21	253.81
		6500×7706.70 equals	2740.75	1909.95
D	80% of \$22846.64 =	18277.31		
			\$11058.98	\$7706.70
(4)	Sound Value	Loss	Insurance	
Stock	\$72,000.	\$500.	(20,000 subject to)	
			(80% average)	15,000—80%)
			(18,500 do. 100%)	19,500—100%)
Equipment	6,000.	250.	5,000 subject to)	
			100%)	\$750.
	\$78,000.	\$750.	43,500	34,500
				\$750.

With each of the five classes of insurance involved the limit of liability is fixed by the operation of the average (coinsurance) clause.

(5)

In the following example the policies of assured are seriously non-concurrent, seven different forms being in use besides specific insurance on horses. The cover of the policies, however, may be reduced to six variations besides the specific horse insurance, the statement of which is as follows:

	Value	Loss	Insurance
Harness and Parts	\$ 782.60	\$ 449.60	) F)))
Hay and Feed	3481.12	3481.12	) 1250) E) C°)
Blankets and Coat	113.00	113.00	)) 3685) 1940)
Stable Tools	212.30	192.55	)) D*) B) A
Other Tools and Machinery	2757.00	1395.76	) 650) 650) 3120)
Vehicles	3329.25	2119.87	)))
Medicines	150.00	150.00	)))
Horses	23000.00	Nil	44900)
Office F. and F.	553.76*	Nil	Covered by A, D* C°
	\$34379.03	\$7901.90	
		Value	Loss
Property covered by A. insurance	\$3120.	\$34,379.03	\$7901.90
B.	650.	10,675.27	7751.90
C.	1940.	11,229.03	7751.90
D.	650.	7,899.78	5632.03
E.	3685.	7,346.02	5632.03
F.	1250.	4,589.02	4236.27
Class A. policy has 100% average clause; others have 80% clause attached.			

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The question arises, should the policies carrying the 80 percent average clause, not exceeding their average clause limits, make good assured's deficiency under the insurance carrying the 100 percent average clause? The principal charge under such a procedure would be upon the D, E and F insurance and would make nearly a total loss to the \$1250. of F insurance, while its contribution would otherwise be only \$694.06.

By no one of the commonly used rules of non-concurrent apportionment can the assured collect their full loss because of the small amount which can be paid under the average clause limit of "A" insurance.

It will be noted that, while assured had a large amount of insurance to value in the aggregate, this arises mainly from the fact that on a horse sound value of \$23,000 they carried \$48,020. insurance, all specific with the exception of one policy of \$3,120, shown above as "Insurance A," while on the remainder of their property valued at \$11,379.03, there was, including the "A" policy of \$3,120, \$11,295. insurance.

This loss was settled by apportioning pro rata on limits of liability, with the exception that for the purpose of contribution with other insurance "A" insurance of \$3,120 was treated as if it carried the 80 percent average clause, so that there might not be assigned to the other insurance the shortage arising from the fact that it carried the 100 percent clause, and then the actual claim on "A" was for its real limit of liability under its 100 percent clause.

(6)

	Sound Value	Loss	Insurance	
Bldg.	\$34,860.	\$14,624.	\$17,000.	A) D.
Stock	8,504.95	8,504.95	3,000.	B) \$16,000.) E.
Mchy.	19,287.72	8,050.	9,000.	C))\$28,000.
	<u>\$62,652.67</u>	<u>\$31,178.95</u>	<u>\$73,000.</u>	
	90% Coinsurance on A. D. & E. policies.			
	80% Coinsurance on B. & C. policies.			

The following methods of apportionment were suggested by various persons, and we show below the results under them with a comparison of an apportionment under the limit of liability rule, which is designated (d) in this case:

APPORTIONMENT.

(a)

Building	Insures	Pays
Specific	\$17,000.00	\$ 7,533.57
BM&S (Blanket)	16,000.00	7,090.43
	<u>\$33,000.00</u>	<u>\$14,624.00</u>

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Stock			
Specific	\$3,000.00		653.07
M&S (Blanket)	28,000.00		6,095.27
	\$31,000.00		\$ 6,748.34
 BM&S			
Limit of Liability under 90% clause	\$8,847.04		
Paid on Bldg.	7,090.43		\$1,756.61
			\$8,504.95
 Machinery			
Specific	\$9,000.00		2,344.30
M&S	\$28,000.00		
Paid Stock	6,095.27	21,904.73	5,705.70
	\$30,904.73		\$8,050.00

The insurance being \$17,000 specific on building, \$3,000 specific on stock, \$9,000 specific on machinery, \$16,000 blanket building, machinery and stock, and \$28,000 blanket machinery and stock, using the full amounts of the policies as contributing insurance, the limit of liability under the 90 percent clause on the blanket building, machinery and stock coverage is exhausted before being apportioned to the stock item. Thereafter an arbitrary method is used by deducting the remainder of the limited liability under the blanket machinery and stock coverage (after the building loss is paid) from the stock loss before apportioning the stock loss to the specific stock policies and the blanket machinery and stock policies.

It seems something of an anomaly to use the full amount of the policies as contributing insurance and then immediately recognize that the blanket insurance is not for the full amount of the face of the policies, but only for its limit of liability. What authority is there for any arbitrary method of using a certain policy to contribute first to one part of a loss and then to a second, when both of these parts are equally covered under the policy and the order could have been as well reversed in the application. Why first exhaust the blanket building machinery and stock insurance, leaving nothing to pay on the machinery loss. Paying the largest loss first is merely a make-shift; the sequence in which the insurance must be applied might probably necessarily be changed in the very next loss for the purpose of giving the assured a full recovery.

APPORTIONMENT.

(b)		
Applying blanket available insurance to greatest loss, as per Conn. rule.		
Building—Loss \$14,624.	Insures	Pays
Specific Insurance—limit 90% cl.	\$ 7,892.14	\$ 6,894.88
Blanket B. M. S.—limit 90%cl.	8,847.04	7,729.12
Blanket & Spec. Available Ins.	\$16,739.18	\$14,624.00

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Stock—Loss \$8,504.95.

Balance of blanket insurance to apply to next greatest loss	\$ 1,117.92	\$ 296.03
Blanket Ins. machinery and stock	28,000.00	7,414.51
Specific Ins. stock	3,000.00	794.41
	\$32,117.92	\$ 8,504.93

Machinery—Loss \$8,050.

Balance of blanket B. M. S.	\$ 821.89	\$ 217.59
Balance of blanket M&S	20,585.49	5,449.76
Specific Insurance	9,000.00	2,382.65
	\$30,407.38	\$ 8,050.00

This apportionment uses the building item limited amount of liability under the 90 percent clause as contributing insurance for both the specific building insurance and the blanket machinery and stock insurance, the remainder of the blanket building, machinery and stock being applied to the stock item and then to the machinery item. It will be noted that as to the stock and machinery items the full amounts of the policies are used as contributing insurance, and not the limited liability amounts as with the building item.

As the loss is not in excess of the insurance on building, stock or machinery, what equity is there in such a process as outlined above? Or of coinsurance limit and full amounts used together?

The so-called Connecticut rule receives most of its common acceptance from the fact that it was supported in *Schmaelzle vs. London & Lancashire* (75 Conn. 397, 53 Atl. 863, 1. L. J. XXXIII 632) by the Supreme Court of Errors of Connecticut, but apparently without the fact before the court that the policies were subject to the coinsurance clause, which is said to have been operative in that case. Had this fact been shown, doubtless the verdict would have been other than as rendered and the fallacy in this rule, when coinsurance clauses govern policy liability, would have been exposed.

DISTRIBUTION.

(c)

Building	Insures	Pays
Specific—90% limit	\$ 7,892.14	\$ 7,838.23
Bldg. Mchy and Stock—pro rata limit	6,833.60	6,785.77
	\$14,725.74	\$14,624.00
 Stock		
Specific—80% limit	\$ 3,000.00	\$ 1,743.26
Mchy. and Stock—pro rata limit	11,588.47	6,733.90
Bldg. Mchy. and Stock—Remainder after bldg. loss	47.83	27.79
	\$14,636.30	\$ 8,504.95

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Machinery

Specific—80% limit	\$ 9,000.00	\$ 5,228.11
Mchy. and Stock—Remainder after stock loss	4,854.57	2,820.73
Bldg. Mchy. and Stock—Remainder after bldg. and stock loss	20.04	1.16
	\$13,874.61	\$ 8,050.00

This apportionment takes into consideration the fact that there is more than the necessary amount of insurance called for under the coinsurance clause, and that in the case of blanket building, machinery and stock policy, its limit of liability is its pro rata amount of the total insurance and not the proportion of the loss which policy bears to 90 percent of the sound value, contending that the non-concurrencies do not force the blanket insurance to pay more than its share of the total insurance, unless by this method the assured would suffer or become a coinsurer, in which case the 90 percent limit would necessarily be used. The pro rata limits are also used in the contribution of the blanket, machinery and stock policy.

It is contended that the 90 percent limits must necessarily be used in the case of the specific policies, because the other insurance is not ascertainable, but that the specific policies receive assistance and the blanket policies are penalized for reason of the blanket policies being compelled to contribute to each item upon which they cover.

It is further suggested that possibly, in view of the fact that the pro rata limits have been used, these limits should be exhausted, and that both the blanket building, machinery and stock and machinery and stock remainders should be deducted from the machinery loss before calling upon the specific machinery policies to contribute.

Unfortunately this apportionment is summarily disposed of through the fact that the payment required from the "C" specific insurance on machinery—\$9,000—is more than its limit of liability under the coinsurance clause.

The computation below shows the apportionment under the limit of liability rule (d) and in connection therewith the amounts argued as payable by the different classes of insurance under apportionments which we have designated (a) (b) and (c).

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		Liability Limits	1st Appor.	Reappor- tionment
A	$17000 \times 14624 =$	7924.01	6022.78	6,909.52
	<u>31374</u>			
90%	34860.			
B	Insurance is the limit	3000.00	2280.19	2,048.
	$9000 \times 8050 =$	4695.35	3568.78	3,205.50
C	<u>15430.17</u>			
80%	19287.72			
	$16000 \times 31178 =$	8847.06	6724.35	7,714.48
D	<u>56287.41</u>			
90%	62652.67			
E	Loss is the limit	16554.95	12582.85	11,301.45
		<u>41021.37</u>	<u>31178.95</u>	<u>31,178.95</u>

It is apparent that while the aggregate of these limits is more than the whole loss a pro rata apportionment on these limits will not assign enough to the A and D to pay the building loss, while the total assigned to B, C and E is more than the Stock and Machinery losses combined. This situation requires the operation of the third paragraph of the rule. B, C and E are assigned \$1,876.87 more than is needed to pay the Stock and Machinery loss, while A and D are not assigned enough to pay the building loss. Deducting pro rata from B, C and E, and adding pro rata to A and D adjusts this difficulty, and as \$27,792.67 of value has \$40,000 insurance under B, C and E, while building valued at \$34,860 has available insurance under A and D of only \$33,000, with \$30,974 needed to comply with the 90 percent coinsurance conditions there would be but little left from D to contribute with B, C and E, and substantial justice seems to have been done to all.

	Sound Value	Insur- ance	Loss	Limits of Liability	Apportionments			
					a	b	c	d
A	34,860.	17,000	14,624.	7,924.01	7,533.57	6,894.88	7,838.23	6,909.52
B	8,504.95	3,000	8,504.95	3,000.	653.07	794.41	1,743.26	2,048.
C	19,287.72	9,000	8,050.	4,695.35	2,344.30	2,382.65	5,228.11	3,205.50
D	62,652.67	16,000	31,178.95	8,847.06	8,847.04	8,242.74	6,814.72	7,714.48
E	27,792.67	28,000	16,554.95	16,554.95	11,800.97	12,864.27	9,554.63	11,301.45
					<u>31,178.95</u>	<u>31,178.95</u>	<u>31,178.95</u>	<u>31,178.95</u>

CONCLUSIONS.

There is common agreement that there is need for the establishment of some regular practice, which will be adhered to by all, in apportionments—some rule or rules which will always be applied to apportionment of non-concurrent insurance and do away with

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the hit and miss methods in vogue. Rules which will consistently yield the greatest payment to the assured which the conditions of his policy will allow and at the same time do substantial justice to the insurance companies which need protection from being called upon to pay under one rule today and another tomorrow, depending largely upon the predilections of the particular adjusters handling each case. This sort of apportionments are not likely to yield a general average protection to all companies. It may well be that to one company will fall a large majority of larger payments, while another company fortunately is called upon for the smaller amounts apportioned, when methods of apportionment are chosen "by favor."

If certain rules might become established for regular use the law of average, on which insurance depends, would be allowed to assert itself also in loss payments required under the vast number of non-concurrent insurance loss claims and thus give this added protection to the companies which they fail to receive at present.

It is therefore suggested that three rules will cover all non-current cases:

For *simple* non-concurrencies, the Cromie Rule;

For *compound* non-concurrencies, when policies are not subject to coinsurance conditions, the Kinne Rule; when coinsurance conditions are present in all policies, the Limit of Liability Rule.

Experience of many years has convinced the writer that consistent and unfailing use of these three rules will prove to any unprejudiced adjuster that they are the only rules needed to stabilize this whole subject, pending the time when it is to be hoped that all policies will be written subject to coinsurance conditions. When this form of policy comes our business will be put on a more scientific basis than it now is.

XXVII
FORMER AND PRESENT-DAY METHODS OF
ADJUSTMENT

SAMUEL R. WEED

The theme of this address was chosen for me or else I would have changed its form and described the subject as the "difference in ancient and modern adjusting practices." When I was a boy going about the streets of New York, there used to be a foolish sort of conundrum on everybody's lips: "What is the difference between a ride in an East Broadway omnibus and a Broadway silk hat?" The answer was "\$4.94," the ride costing 6 cents and the hat \$5.00. I wish it were possible to tell you the difference between the former methods and present methods of adjustment in an equally conclusive way in which the answer to the conundrum was given. What I shall say on this subject applies to New York and vicinity, and is not intended as a reflection upon the present methods of any other locality.

You will readily believe the differences are radical and yet there are some old fogies who still believe that the changes in the last thirty (30) years in various underwriting phases, are not all improvements upon the old methods. "Ephraim joined to his idols" was the forerunner of those old fossils. The remark that the changes in underwriting are not all improvements applies I presume to adjustments but after making due allowance for present imperfections, it can be justly said that the methods now employed have met with the approval of every company concerned and brought about desirable results which were literally impossible under the old system. Yet I hear often there are no more "adjustments" but only "settlements." In some other cities our plans have been partially followed, and while the New York system is not wholly an original device,—it is "cooperation" nearly perfected and the fruit of experiments more or less imperfect tried elsewhere.

The germ of the present New York system was really born in Cincinnati where a corporation was formed by local companies for the adjustment of losses, under the name of the Insurance Adjustment Company of Cincinnati, and was organized in April, 1875. The idea apparently came from the Secretary of the Amazon Insurance Company.

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At the time of its organization, there were twenty-two (22) stock companies and five (5) mutuals, doing business in the city of Cincinnati, most of them now on the retired list. Mr. Bament writes me a brief account of it and says: "The old adjustment company was laid to rest in the insurance cemetery, I think, in the year 1886."

The conditions in this city prior to 1876 were very unsatisfactory both to companies and underwriters. They all recognized the evils and sought to remedy them by individual action. There was no systematic cooperation in handling losses. The process was simplicity itself. Far back in the fifties when a loss was reported in this city, the office interested would send an outdoor solicitor or inspector to take a look at the damage and report to his chief. If it was an important loss then the Secretary or President would inspect it. When several of these officials met on the ground, some or all of them would usually agree on some individual but they never named an adjuster to "take exclusive charge" of the loss. This plan continued with some variations through the sixties but by 1872 some companies organized loss departments, growing out of the lessons of the Chicago conflagration. Cooperation increased but it was never formally adopted by all offices. Each company was still its own boss in adjusting losses and consequently it made only a part of the general management of each office. The adjusters employed by the companies under this independent "go as you please" plan, sometimes were able by their own strength to obtain more cooperation than in former years, but it was a plant of slow growth and was attended by many drawbacks. There is no doubt according to the gossip of the period, that many companies were deceived by the men they employed. The salvage operations at that date offered great opportunities for graft and there was a general suspicion that it was extensively practiced. Then about 1879, private parties organized salvage companies for handling damaged merchandise whose facilities and expert knowledge in reconditioning such goods were of great service and value to the companies. While recognizing the possibility that the companies were overcharged and sometimes cheated in achieving results, the sufferers were not discontented and generally well satisfied because results were more beneficial than under the former methods. But the growth of the evil became more and more a burden and something of a scandal. The end of the salvage abuse came when a large majority of the companies took the matter in their own hands and organized a salvage

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company which is still in existence. The company rented a warehouse—employed their own experts and began to take the damaged goods into their possession at the request of the companies and dispose of it on business principles to the best interest of the underwriters. This movement was all in the line of cooperation. In 1901 the New York Board adopted a resolution providing for the organization of a committee on losses and adjustments. Many doubts were expressed regarding its feasibility but the work proceeded with the general cooperation of the companies. Rules were adopted by the Committee, most of which are still in force. The Committee has made very few modifications and additions to the earlier rules. Under this authority, the Committee were and are still authorized to take charge of all losses where there are three or more companies interested and if there are less than three companies, the Committee may still take charge of any loss at the request of any company concerned. The Committee has a list of approved adjusters who are elected by the concurrent vote of eight members not however until after notice of application has been sent the rounds of all the companies and answers as to honesty, competency and past conduct or practices requested. After their election the secretary of the Committee assigns the adjusters on each loss—seldom less than two, or more than three. The adjusters are required to keep in close touch with the secretary and no contracts are given out for salvage, legal service or accountant work without the Secretary's consent. The office is well organized and the system has been found in practice to work well. The adjusters are paid through the Committee and the bills must be approved by the Secretary or in case of dispute, submitted to the entire Committee for approval. The earliest effect of the transfer of adjustments to the Committee, was to reduce the expenses. Many a company found in comparison with old style bills for simple adjustments that whereas they formerly paid \$25.00 for a common place adjustment, their Committee bills were often less than \$2.50 and in some instances half of that sum. The salvage operations are now systemized in the interest of economy and better still, the experience of salvage experts in the appraisalment of losses tends to produce the most satisfactory results. The second effect was the cessation of all suspicion of graft. There may have been criticism in particular cases but the instances are very rare and wherever the salvage results are questioned, the adjusters may investigate the details. This matter is not wholly within the control of the adjusters but there is a harmonious relation be-

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tween the operation of the Salvage Company and the Loss Committee which opens the door to every source of information which can throw any light upon the loss or salvage. The Committee has passed upon nearly 25,000 losses since its organization and settlements up to the first of this year are \$86,350,466 and with less friction and less expense than was ever known in former years. (February, 1915.)

One of the most important results under the new system is the accumulation of a large mass of historical data relative to fires reported to the Committee since its organization. These records have grown to be of immense size and occupy most of the wall space in our offices. They contain the story of hundreds of suspicious fires in the past and of the operations of public adjusters and claimants. These records are simply invaluable for future reference. It is possible now to keep track of the fires which are reported both as to location and name. With the co-operation of companies and outside sources, the Loss Committee is now equipped to follow up all suspicious cases and especially to advise the companies whether prior losses were honest and legitimate. The extent of the usefulness of the information gathered in the present adjustment method, is one of the most important features in the whole system. Nothing like it in the old system existed although private detectives were and still are paid for the general purpose of investigating the moral hazard suspicions.

Now compare this system with the crude methods of the fathers. In the early fifties it happened that some of the old fashioned local companies employed a single inspector and occasionally one solicitor who worked for three or four companies. These men were the forerunners of the present brokers. They came to be employed for all manner of outdoor work but chiefly inspecting and soliciting. Some of these names are mentioned and among them we occasionally hear of some who did effective service in adjustments for their own office. They obtained the service of builders on building losses, and merchandise experts to appraise losses on stock but the work was never brought to the conditions now employed. Out of this crude method gradually came an advanced step in calling the interested companies together after a loss and appointing a Committee to adjust it. These meetings were somewhat a result of the Chicago fire adjustments. They continued for many years and even up to the time when the Loss Committee was proposed. They were seldom unanimous and frequently the results were unsatisfactory to the majority

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of those interested. The Committee usually levied an assessment for their own services and if there were any proceeds or salvage the Committee deducted the amount of the assessment without much ceremony. Of course this practice led to considerable criticism which increased when the position taken by the Committee was that it was their right, and because the amounts contributed by each interested Company were small, no complaints were made. Still the suspicion got abroad that it was arbitrary and that a few persons whose names appeared too often as adjusters were getting rich on the spoils. The routine of this crude method was the simplest imaginable. An agency became somewhat conspicuous in the early seventies for managing the meetings of the companies upon losses on the basis of a political caucus. The senior partner had an amiable way of calling on the offices before the hour of the meeting and proposing himself or one of his chums as chairman and as the inevitable plan was to allow the chairman to nominate the Committee, it followed as a matter of course that the favorites were chosen. Nobody ever openly charged that there was any graft in this proceeding but it was criticised very freely. A few years later a shrewd gentleman with a suspicious name who was engaged in salvage operations as already stated is said to have retired with a large fortune and many underwriters were criticised for the tenacity with which they adhered to his services and insisted upon his assistance in settling the simplest losses. I have a personal recollection of a loss on a neckwear factory in this city, in 1878, where the only salvage was a few pieces of silk in a corner of the second story. It cut no figure in an otherwise conceded total loss. The value of the silk in the books of the firm was about \$750.00 and the assured had no objection to any appraisalment the companies desired to place upon it. An adjuster who was influential appeared on the scene and insisted that the salvage man should be allowed to take the remainder of the silk for \$50.00 and because some other objected, the adjustment was hung up for three weeks, the assured having meanwhile advised the companies that they were willing to accept \$50.00 to expedite the settlement. It was a matter in which companies had practically no interest and they simply awaited events. The silk was finally sold for \$100.00 to the salvage man who put it through reconditioning process and sold it at auction for \$500.00. There was a private scandal about it but it never came to anything further. This case is referred to now as a specimen of the lax way in which such matters were carried on. This will never occur again. This incident is forgotten by nine-tenths of those who were aware of it.

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I remember being called to Nashville, Tenn., some years ago to visit a local agency. On my arrival at the Maxwell House I was surprised to meet fifteen or twenty special agents (many of whom I knew very well) and whom I found out afterwards were engaged in adjusting a loss on merchandise. Late in the same afternoon, I called around the lobby of the hotel and was invited to a room where two-thirds of the special agents were engaged in a very interesting game of draw poker. I was invited to participate but respectfully declined though I stayed in the room long enough to see that their interest in the game was very great and the stakes considerable. In the evening I asked one of them why they were not engaged in the adjustment in the day. Then I learned that two men of the whole number were doing the work while the others were engaged in the gentlemen's game before mentioned. I happen to know of a similar incident in the city of New York where a number of special agents from companies outside, came here in 1880 to assist the local representatives in adjusting a loss and spent most of their entire time in the room of a hotel playing the game. You may imagine that this was not in accordance with sound business principles, but it was the old way.

In 1876 there was a very destructive fire in this city involving insurance on buildings and contents in 444 to 452 Broadway, to the amount of \$3,418,099 which was finally adjusted for \$1,751,135. There were six firms burned out and the companies on buildings each carried from \$100,000 down. The stock lines in this loss averaged less than \$5,000. In bringing out the history of this loss I have learned that twenty-eight adjusters were employed in this settlement. I haven't the least doubt that in our day six adjusters could have handled all the losses to better advantage (particularly in the salvage) than the twenty-eight, thirty-nine years ago.

In March, 1877, the famous Bond street fire occurred in an omnibus building Nos 1, 3 and 5. It was occupied largely by jewelers, watch makers, agents and the Gorham Manufacturing Co. The chief values were contained in thirty-two iron safes which footed up in the final proof at \$786,000 upon which there was an insurance of \$427,000 which was 54 per cent. of the value. The loss was settled at \$267,298 or about 62 per cent. which throws a side light on the value of the 80 per cent. clause now used. It is stated that forty adjusters and appraisers were employed in the settlement, representing ninety companies insuring twenty-nine firms or interests. But at the present time five adjusters or at the utmost ten, could

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have settled all these losses much quicker and with more satisfaction than the forty who were used in 1877. The history of this loss and the settlement reveals that there was unnecessary friction and useless delay.

In January, 1878, there were two important losses within a few days of each other. The first was on the northeast corner of Broadway and Grand street, occupied by Howard Sanger & Co., Naunberg, Krause & Lauer and Edwin Bates & Co., with insurance on building and contents of \$2,130,000. It was settled for \$1,321,973. Each firm's insurance was separately adjusted and twelve adjusters employed. In our day, three men have handled larger losses with equal satisfaction to the companies. A week later a fire occurred in the heart of the dry goods district on Worth and Thomas streets, within a few doors of Church street. The buildings for a half block were damaged more or less and three very seriously. The total insurance on buildings and contents was \$7,253,296. On this occasion dry goods in packages proved their superiority as a fire risk over millinery and fancy goods. The final adjustment showed a loss to the companies of \$1,976,734. There were twenty-nine separate interests and while there is no record of the number of adjusters, a careful comparison of the amounts of the proofs filed shows that at least twenty were employed in settling the loss. An official who participated in the loss told me there was "a small army of them."

These are examples of the way large losses were adjusted. The opportunity for differences between adjusters and owners was more conspicuous in the small losses but as the business progressed and the companies began to take keener interest in details of adjustments and in the skill and ability of their own adjusters it began to impress itself upon the officials of companies that there was room for improvement in methods. At the same time the necessity of closer cooperation was more and more apparent and many companies organized loss departments and employed competent men at their head. In others not so highly organized, certain preferred adjusters were employed and that is the only practice which has continued to this day. It took a long time to root out the practice of levying an assessment on the companies or deducting it from the salvage. The companies objected to this system and although it died hard it was killed finally early in the eighties.

The appearance of public adjusters was in the late eighties and forms a distinct chapter by itself. Some of these men were reputable and some otherwise. One of the pioneers who long since de-

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parted this life, obtained considerable credit with the companies as an accountant and it was in this capacity he first turned up in adjustments. He was credited with serving both the companies and the assured ably in compromising difficult cases. He was very fair to the companies and no doubt promoted an era of good will which might have continued longer if he had lived. The opportunity for collecting large fees for assisting the assured in effecting settlements offered strong temptations to others less scrupulous and in a few years the ranks of public adjusters were swollen to unwieldy proportions. The scandal began when these men got their jobs by giving the assured bad advice. The Loss Committee took cognizance of this evil from its early organization but it was powerless to prevent its growth. In the report read to the Board in 1910, the following reference to the public adjusters may prove interesting:

"In the Metropolitan District there are about twenty firms—individuals or partnerships—regularly engaged in the adjustment of fire claims for the public, employing considerably more than one hundred persons as clerks, solicitors, inventory-takers, etc. A few of these concerns confine their operations to Brooklyn, but most of them handle losses throughout the territory of the Exchange, and even outside of it. Of the entire number, not more than six have any considerable proportion of high grade people among their clients. Some rarely get any but household furniture and small retail stock losses to handle. Excepting the small losses picked up by night-hawk solicitors—and not excepting all of them) the public adjuster's business comes to him almost wholly through arrangements with certain brokers, with whom he divides (for the most part equally) the commissions he receives for the adjustments. Ordinarily the insured is ignorant of this arrangement, and the majority would be greatly astonished to know that the broker's motive in sending such losses to a particular adjuster is mainly or wholly mercenary. Occasionally a public adjuster whose general run of business is notoriously bad forms a partial alliance with a few brokers of high repute, and, as these brokers ought not to be ignorant of the man's record, it is a natural inference that extra inducements have been offered them in such cases. These standing arrangements with brokers are at the bottom of much of the evil in the business. On the one hand, a public adjuster cannot well refuse to handle a claim coming to him through a regular broker-ally, even if the fire looks "queer" or the claimant has eccentric ideas as to the making up of a claim. On the other hand, the reduction of net income entailed by the double necessity of meeting competitive offers from rivals and giving away half the price at which the adjustment is finally secured, forces himself to adopt all kinds of devices and practices to get his original contract price increased. Often, when he thinks the claimant will not object, he intimates that money may be useful to quiet the doubts of the company's adjuster, or to facilitate the passage of the proofs of loss through some company's Loss Department. Sometimes, he merely exaggerates the difficulties he has encountered, and the value of the additional and unforeseen services required of him. Sometimes he makes a new arrangement for an additional compensation conditional upon the collection of an amount in excess of the minimum sum which his client would accept as satisfactory. But, whatever the method followed, he is constantly on the alert to increase his compensation above the agreed figure, and this is a condition which obstructs an honest handling of losses. Many public adjusters freely declare that they could not continue in business if they

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were in all cases limited to the commission originally agreed upon. That commission itself, while supposed to be ordinarily in the neighborhood of 5 per cent., is sometimes 1 per cent. or even less; sometimes 10 per cent. or even more, according to the exigencies of the case, the character of the competition, the ignorance of the insured, etc.

Not all of the fraudulent tricks used in such adjustments are known at the time to the head of the public adjusting firm. Sometimes an inventory-taker persuades a claimant that great things can be done by bribing a Patrol watchman to allow the appearance of damage to be increased. If he gets money for this purpose, he will pretty surely keep part—or all—of it himself, even if he succeeds in carrying out the expressed object of the deal.

The Committee has from the beginning done what it could by its conduct of each separate adjustment to penalize, directly and indirectly, the mishandling of claims for claimants. One public adjusting firm retired from business after the finding of an indictment against one of its members for the submission of false proofs of loss. In each of two separate cases it has cost a prominent public adjuster (not the same one) nearly or quite \$15,000 because his name was identified with wrongful transactions in connection with a loss or loss adjustment in which this Committee was interested. In very many cases public adjusters have withdrawn from adjustments because unwilling to incur the Committee's disapproval of remaining in them longer—in one case after first discharging an employee shown to have been guilty of fraud and misconduct. In this way, without the exercise of an oppression or abuse of authority by the Committee, a very general wariness as to wrong doing in adjustments has been created, to the advantage of underwriters and the public at large. It is doubtful, for example, if any public adjuster in New York would have had the courage to "stand for" the gross overstatement of values submitted in connection with an important Committee adjustment during the past year by a well-known broker. Doubtless the known preservation of full records of the Committee's adjustments, with their eloquent memoranda of all kinds of misbehavior, has had an important influence in bringing about an improvement. Many of the lower grade of public adjusters seldom have a "Committee loss" to adjust, and others of them are being taught to avoid that class of business, or to handle it with great caution."

It has been publicly charged for a great many years that adjusters have been hard-hearted, grasping and insistent upon the companies obtaining settlements to which they were not entitled. This general statement has been accepted as true by a large number of people and the moment the good faith of an adjuster is mentioned, it is met by denials. I am reminded of a conversation with a gentleman, whom I knew when I was in the business in the West, and who has gone to his fathers long since. He had been secretary of a local company which retired from business, and took up adjusting. In a conversation with him about one year after he had entered this business, he stated to me that he had always heard that adjusters were sharks and tricksters and when he entered his career as an adjuster, he thought he would try to do something to avoid such a reputation. After one year's experience he had come to the conclusion that for a man to do justice to the companies and the assured, he was bound to get the reputation of being tricky to the as-

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sured or over zealous for his company. He said that in his younger days when he went to Sunday School he was very much impressed by the story of Moses and Pharaoh and particularly struck by a sentence which appeared in the account in which it said that "The Lord hardened Pharaoh's heart." That puzzled him very much in his younger days but he said now he was able to explain it. The Lord made Pharaoh an adjuster to the Israelites and the hardening of the heart came soon after.

I leave you to make the application to present conditions.

Up to the year 1871 no such organization for the adjustment of actual losses had ever occurred as appeared in the adjustment of the Chicago conflagration loss. In that case the adjusters engaged a hall and instituted a sort of clearing house system by which claimants were to present their claims to the adjusters representing the companies and then the matter was taken up and each loss settled on what seemed to be its merits. There was some friction and some delays but generally the losses were settled promptly. The usual experience of claimants taking not only the last pound of flesh but several more pounds in addition, was developed in this long settlement. It is not surprising that when the losses were all settled the adjusters held a sort of jollification meeting and agreed among themselves to provide gold badges in honor of their services in this adjustment. When the question came of a suitable inscription on the badge it was finally agreed that it should be "SOC-ET-TU-UM" and these badges are held in very great esteem by those that have succeeded in the work of the Chicago adjusters. This has nothing to do with ancient or modern practices but it has a great deal to do with the human nature which was the same in 1871 as it is in 1915. Notwithstanding all the criticisms over the Chicago adjustments I have never heard of a single instance where the integrity of the adjusters was in question.

The mention of the Chicago conflagration adjustment reminds me of San Francisco in 1906. I was in that city a few months after the great conflagration and many of the adjustments were still incomplete. I heard all kinds of stories about the experience of adjusters. I made up my mind however, that there was not much chance of the motto of "SOC-ET-TU-UM" ever being used on the San Francisco badges. I cannot resist the temptation to mention one instance to illustrate the leniency of the San Francisco adjuster.

It is related that one day a Chinaman entered the room where the adjusters were all stationed at separate tables and presented a

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policy so that the doorkeeper directed him to the adjuster representative. When he came to the latter, the Chinaman held up his policy and the adjuster supposed that he came to claim a loss and began to talk about "six bits," meaning 75 cents on the dollar. The Chinaman answered "How much money?" which was almost the extent of his English on the occasion. The adjuster took the policy and found that it was upon a store and fixtures located in the burnt district and from general observation he was satisfied that there was no salvage in sight so he figured out how much loss he was willing to allow on the policy at 75 cents on the dollar. When he mentioned the sum to the Chinaman he said "Allee samee Melican man"? The adjuster assured him that those were the terms on which they settled all American losses. "Allee Rightee" and before he left the room, the Chinaman had the draft in his possession and the company had taken a receipt and a proof which was witnessed by another adjuster.

You may imagine the chagrin of this easy going adjuster when he learned three days after that there was no property in the store and that the Chinaman had come to the office to cancel his policy and get a return premium. He had been advised to do this by a broker but the prospects of collecting 75 cents on the dollar was evidently too much a temptation for the Chinaman and he probably left well satisfied over his success.

There was not much of the "SOC-ET-TO-UM" practice on this occasion save as to the company concerned. I cannot vouch for the truth of this story but it was repeated to me so many times I had to accept it as probably if not literally true.

At the present time there is a marked improvement in the conditions. Public adjusters have been charged with complicity with the work of an incendiary and one of the most brazen of the lot (who had the audacity to hire an office in the Underwriters Building) has been convicted of fraud and sent to the State Prison. Others have ceased their tricks and some who are under suspicion have repented and reformed. The State Insurance Department has obtained legislation requiring them to secure licenses and borne down heavily upon the doubtful ones and insisted on explicit answers to soul-racking questions being given for information to the Department. In some cases the Department has withheld the license to applicants and I think refused several of them. The result has been to lessen the evil which is another evidence of the difference in

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present and former methods of adjustment. I might probably add—in the quality of the public adjusters too.

I cannot forbear saying that the companies are well satisfied with the changes in adjusting within the last twelve years. There is a wide open chance for a larger use of the moral hazard information in the hands of the Loss Committee and the knowledge gained by adjusters in tracing the origin of fires is materially assisted by the information taken from the files of losses now in our possession. Neither the National Board nor any private agency can ever hope to gather a tithe of the data equal in value to that now in our hands.

Whether the old methods should be preferred to the new methods of adjustment must be judged by the fact that nobody has ever proposed to exchange the new for return of the old. "By their fruits ye shall know them" was given as sound advice 1900 years ago and it still holds good in judging adjustment methods, both old and new.

XXVIII PSYCHOLOGY OF LOSS ADJUSTMENTS

GEORGE R. BRANSON

President, United States Fire Insurance Co.

I feel fairly justified in defining the subject of this discourse as the personal equation in adjustments, the relationship of the human mind to all interior, exterior and ulterior phases of loss adjustments. It may also be more particularly defined as a study of the relationship of the adjuster to any person or thing with which he is brought in contact in the conduct of his profession.

I have divided my talk to you into the several heads which naturally present themselves:

- (1) The Relation of the Adjuster to the Public.
- (2) The Relation of the Adjuster to the Assured.
- (3) The Relation of the Adjuster to his Principal.

While each of these relations is in many respects apart and distinct from the others, they still are so closely interwoven at the points of contact as to render it difficult to wholly separate discussion of any one so that it will not overlap the discussion of the other two.

ON THE RELATION OF THE ADJUSTER TO THE PUBLIC.

Under this head come three sub-divisions:

Non-discrimination.

Prevention of further fire waste.

Co-operation with public officials for the prevention of crimes directed particularly against Insurance Companies.

By its very nature insurance is, or should be, a business of discrimination, but not of unfair discrimination. Unfair discrimination is forbidden by law, but the statute is generally assumed as having only to do with rates and cost of acquisition of business. As I read it, the law is also intended to eliminate favoritism in adjustments. Jew or Gentile, black or white, of the four hundred or of the four million, the side street tradesman or the dry goods merchant prince, the top floor sweater or the industrial trust, all hold the same contract of indemnity, all have,

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in theory, paid the full rate for protection, and in the eyes of the law all are equal. Sub-conscious bias may make the adjuster favor the man of social status and wealth and the firm of established reputation for honesty, and view with disfavor the expatriated product of Christian oppression in darkest Russia, but a professor of casuistry would be non-plussed for an explanation that would explain the waiver of the coinsurance clause in favor of the commercial light or bank director and reconcile the act with the doctrine of non-discrimination.

The adjuster whose intelligent investigation of the causes of fire leads to the removal of the hazard or its regulation will not go down in history as a public benefactor, but he is none the less a potent element in the economic warfare for the elimination of waste. The altruistic spirit which leads an adjuster to go outside the mere letter of his commission and labor for his employers in a field not distinctly his own, has not generally met with the response to which it is entitled, but nevertheless this spirit, and its application, operate in no uncertain way to the benefit of the public through the medium of rate concessions for bona-fide reductions of hazard.

In considering the moral hazard and its partial elimination as the result of careful adjustments, it is fair to assume that, except under conditions of specific and extreme distress, few men will exchange merchantable property for its immediate cash equivalent, freighted with the burden and cost of proving the amount. It follows, therefore, that no sane man will deliberately burn his property except in the hope of realizing an amount in excess of that which the property would produce if disposed of in ordinary or even extraordinary channels of business. To the so-called "liberal" adjustment may be charged many claims, incendiary in origin and fraudulent in presentation. The term "liberal" is a misnomer in this connection—rather should it be "loose." The Simon pure liberal adjustment is that in the course of which ambiguities are resolved in favor of the assured, mere technicalities waived, and the benefit of the doubt given the holder and not the writer of the insurance contract. The real liberal adjustment retains for the Companies and the adjuster the wholesome respect and friendship of the assured. On the other hand, the loose adjustment makes for gross contempt for the insurer, and often opens the door to dishonesty practiced upon the assured by his own representative in an attempt to participate in the spoils. Of prime im-

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portance, therefore, is it that adjustments should be fair and truly liberal. Loose adjustments lead only to crimes against the people and loss of surplus to the underwriters.

Cultivation of cordial relations with the police and prosecuting authorities of the territory to which the adjuster confines most of his activities is an absolute necessity to him who would attain to the highest position in his profession. While public officials are in theory supposed to listen to all complaints and sift the real from the fancied grievance, it is the fact that those complaints presented by persons known to be honest, reliable, and not vindictive, are at the very outset given full credence and earnest investigation. The adjuster who is known to the Public Prosecutor as one who will not attempt to use the criminal process as a means to avoid civil liability, and who can be relied upon as able to control his principals in this respect, is in possession of an asset of inestimable value, the acquisition of which has been at the expense of vast labor and infinite patience.

It may not be amiss to say here that I have always found the District Attorneys of this County merciful to all but persistent criminals. The letter of the law has almost always been subordinated to its spirit. Our Grand Juries exhibit the same sympathetic tendencies, and many times have in substance told the offender to go and sin no more. Not always, however, is the Scriptural injunction heeded; and I am reminded of a case within my charge a few years ago where the assured, after months of denial and evasion, broke down after three hours of examination in my office and confessed his crime, which I know now, but did not know then, involved arson as well as fraud. Through mental stress, the man had become almost a physical wreck; and with the tacit consent of the District Attorney's office, criminal action was not instituted, and his signed confession remained in my possession until, less than a year and a half later, he participated in one of the most celebrated highway robberies the City has ever known. The confession made to me was the means of effectually disposing of his plea of previous good character, and for eighteen years he is placed where Banks and Insurance Companies need not fear his activities.

ON THE RELATION OF THE ADJUSTER TO THE ASSURED.

It is not my intention to bore you with details on this particular subject, nor do I feel qualified to assume to tell you how

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losses should be adjusted. I am still a student in the profession, and doubt whether I will ever pose as a teacher. I do know, however—and must emphasize it to you—that the adjuster is the *one man*, representative of the fire insurance interests, who is continually in contact with the assured; and the assured's opinion of those interests, and in particular of the Company or Companies represented by the adjuster, is largely and justifiably influenced by the character of the man to whom is delegated the adjustment of fire losses. I venture to say, and I challenge contradiction, that most of the legislation inimical to our interests has had its inception in the minds of policyholders who felt themselves outraged by dishonest or unfair or technical or unnecessarily protracted adjustments. I am credibly informed that today legislation is contemplated, if not impending, in one of our Southern States to do away with the iron safe clause. Should such a law become operative in one State, it will be well-nigh impossible to prevent its adoption in the others. The cause is directly traceable to lack of judgment and diplomacy in the adjustment of a fire loss.

There are many types of claimants, and for this reason alone versatility is an essential quality for the adjuster to possess. We have, I am glad to say, the strictly honest claimant who scorns to think or act improperly, and who, by the same token, when in error is hardest to deal with; we have the claimant, also honest at heart, who pads his claim solely because he has been taught, or has heard, that Insurance Companies never pay a claim as presented. In dealing with this latter class, I find the best policy to be one of extreme frankness. In many instances of this character I have returned an exaggerated schedule to the claimant, and subsequently received a revised one strictly in accordance with the facts—immediate approval, and the claim passed for payment, our business has made at least one new friend. My memory reverts to an aged lawyer of this City, long retired, who suffered a slight fire loss to some old but rather valuable law books stored in an out-building attached to his home. Real value was naturally difficult of ascertainment, and in response to my inquiry, the assured stated that two hundred dollars would be a fair allowance. This impressed me as equitable, and the gentleman was sent with a clerk to an adjoining room, there to execute proof of loss and receive payment. In a few minutes he returned to my office, visibly perturbed, asked for a word in private, and said that his loss was not two hundred dollars but that he had so stated believing that no

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Insurance Company ever paid a claim in full. His belief was founded on report only, as he had never before been interested, directly or indirectly, in a fire loss.

Allied with this type of claimant is the one who honestly but mistakenly believes his property worth greatly in excess of its actual value, as, for example, the manufacturing hatter who insists upon the marketability in the South of that part of his stock which consists of ancient derbies of the music-hall German comedian style, or the elderly lady who will not entertain the suggestion of depreciation on her home of the late General Grant or early Jesse James period type of architecture, and its "parlor" furnishings of horse-hair sofas and chairs, antimacassars, wax flowers under glass, and family albums. A keen sense of humor serves the adjuster well in cases of this kind.

Then there is the passively dishonest claimant of the type of the lumberman whose source of supply has become exhausted. What adjuster of wide and varied experience does not remember seeing the glaring signs prohibiting smoking placed everywhere in the lumber mill operating with full millpond, and big supply still on the stump? And with the lumber cut about exhausted, what adjuster is there who has not noticed the absence of signs in the mill and the popularity of cigarettes and pipes? What change had come over the spirit of the millowner's dream, and was the sure-to-come fire unwelcome? Of course there was no incendiarism, unless mind had triumphed over matter; but the translation of old buildings and machinery into new money led to no tears of regret except those of the unlucky or unwise underwriter.

For the actively dishonest claimant—the incendiary or fraud, or both—I can conceive of no treatment too drastic for administration. For the welfare of all interests, every defense should be employed—every technicality availed of; in fact, this is the only use that should be made of technicalities.

Long years of experience have taught me to rely greatly on what for lack of a better title I shall call the "visualization of crime." To illustrate what I mean, let me for the moment present to you a cloak and suit manufacturer at the end of a bad season—a warm winter or a late spring, overstocked with unsold merchandise and staggered by returns of rejected goods, bank discount exhausted and creditors dunning incessantly, accounts receivable hypothecated and bank balance barely enough for the next payroll. F. or F.—fire or failure, or, not to discriminate, F.

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or M.—fire or mahulla, and he elects—fire. From the physical evidence obtainable after the fire—the unmistakable signs left by vapor ignition, or the less apparent ones resulting from the use of chemicals, from the story told by the check book—rich only in unused checks, from the exaggerated profit ratio in the previous fiscal period resulting from the substitution of a padded inventory—from all these major indications and from many minor ones come the material for the “visualization of crime,” the construction of the Frankenstein of fraud and arson, which, unfortunately, rarely results in total defeat of the claim and conviction of the criminal, although in most instances profit to him is eliminated by the logical results of the process.

In connection with the general subject of the relation of the adjuster to the assured, a word on the matter of appraisals may be opportune. The authors of the standard fire insurance policy did not intend the appraisal provision to be used by the Insurance Companies as a means of coercion or oppression. It follows, therefore, that except in instances of positive and radical difference with respect to the measure of loss sustained, a demand for an appraisal is requested as a means to an ulterior end, and as such is a perversion of the intent of that provision of the policy. Recognition of this situation led a few years ago to the mandatory addition in the policy of a clause allowing the selection of an umpire by the judiciary where the appraisers failed to agree upon one within a reasonable time.

Except where differences are radical or where it is used as a “stop order” in cases involving fraud, positive proof of which is lacking, an appraisal should be avoided by the adjuster and every honorable means used to amicably reconcile conflicting opinions.

ON THE RELATION OF THE ADJUSTER TO HIS PRINCIPAL.

On the part of the principal there must exist absolute confidence in the integrity and reasonable confidence in the ability of the adjuster. I have known, but happily have not been associated with, some offices where the adjuster was treated as a necessary evil, and accorded the welcome which might have been given the undertaker or executioner. Possibly recitals by the adjuster of minor incidentals or adjustments involving bad judgment, euphemistically described as “hard luck,” may have been responsible for the treatment. In reporting, I find that a general outline of the cause and extent of the fire and of the final result

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of the adjustment comprises all of the information ordinarily required, although I note that in the current month our National Board has become inoculated with the germ of loss classification, with its attendant detail.

I deprecate most strongly the employment of experts and lawyers in cases where the work they do should properly be performed by the adjuster; and on the other hand, no one is more quick to recognize than I am the necessity for their employment in cases where their services are essential to proper investigation and determination. The adjuster who cannot examine books of account, determine the value of and loss to ordinary machinery, who cannot keep himself in close touch with tendencies and trends of merchandising conditions, who cannot conduct ordinary examinations under oath, has no right to expect of his profession that it will yield him its maximum of reputation or remuneration. Per contra, the adjuster who by constant application and study can give the public, the assured, and the underwriters all of these services is by right entitled to equivalent recognition and to a status coordinate with that of his underwriting associates.

Genius in this day may be defined as the capacity of an able man for gathering about him men of greater ability in their specific spheres of useful effort. Fire insurance has been characterized more by aridity than by fertility of genius as thus defined, and today many of our Company officials are wasting valuable time in attempting economies which could be more profitably employed in promoting efficiency. Happily, there are some oases in the desert of managerial bourbonism, and the trite and homely, but applicable aphorism of "Saving at the spigot and wasting at the bung" may yet be forcibly modified by the economic saving grace of the law of the survival of the fittest.

There appear intermittently movements to reduce the cost of loss adjustments, generally by proposed reductions in adjusters' charges. I am inclined to believe that these movements have their inception in the minds of Company officials and managers whose early training has led them to the belief that all men are naturally honest, that claims are presented which closely approximate the actual loss, and that an adjustment bears a marked resemblance to the labor of a child making a picture out of a complete set of blocks. In other words, the result is always in hand, merely awaiting the moment for it to become an accomplished fact. Most of the blocks I have been handed in the past fifteen years resembled

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three sets mixed together and then half of the whole thrown away. The resulting picture, after cutting and trimming, would rival a cubist masterpiece.

Seriously speaking, I believe the ratio of adjustment cost to loss will continue to rise, and that the rise, instead of being detrimental, will be of distinct benefit to insurance interests. This increase in ratio will be of twofold nature, the major factor—loss-declining in volume, and the minor factor—cost-increasing with the introduction of the trained adjuster to supplant or succeed the untrained. Fire prevention by physical means has taken a long and broad step forward in the past few years. Fire prevention by moral means, inculcated by stress, if necessary, demands that adjustments be made by trained adjusters, educated to their calling, and not by unsuccessful merchants taught only in the schools of experience.

To the young member of this Society whose face tonight evidences the question he would ask, I answer by saying to him that the adjustment of fire losses offers a splendid field for progressive employment at fair remuneration, conditioned, however, on adequate mental, moral and physical aptitude for the work; but unless he loves it, and recognizes it as the only real human side of fire insurance, he had better continue imbibing wisdom from those who preside over the destinies of other branches of the business, in one or another of which he may find what today is popularly termed his "place in the Sun."

XXIX

UNUSUAL AND INTERESTING FIRE LOSS CLAIMS

WILLIAM R. PITCHER

It seems to me that a look into the past to observe the growth and improvement in adjustments, is desirable for the best understanding of the present conditions.

When I first started in the insurance business the adjustments for the New York City companies were made largely by the surveyors. These gentlemen were also the real underwriters, for their reports while meagre as to description of actual conditions, closed with underwriting recommendations, which were always accepted by the companies they represented. Their objective point in the adjustment of a loss in most instances, was to settle for the smallest sum possible, without reference to the actual loss.

Following this period when the surveyor was so prominent, the loss adjustments were made by committees appointed by the companies at meetings held at the Board of Fire Underwriters' Rooms. These committees, usually company officials, were at the time of the final report of adjustment voted an honorarium even if they had employed an adjuster, a few adjusters having in the meantime started in the business.

Later, the companies felt that too much favoritism was shown in connection with the selection of those committees, and because of this dissatisfaction, they began to employ adjusters for each loss. In some cases special agents were brought in to act as adjusters for individual companies. This individualistic adjustment practice resulted in a large number of adjusters acting in each case, without any diminution in the expense of adjustment, and with distinct efforts to curry favor for the individual office at the expense of the associated companies, resulting in practices that were as cheap as retail clothing store advertising.

In a case I have in mind, where there were about a dozen adjusters, one of them being unable to await the final closing of the case stated on leaving, that "for his company he would pay as much as anybody."

Some settlements were made with an agreement with the assured that if any other adjustment was made for a smaller sum, the

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company settling should have the same advantage and not pay more than the lowest sum fixed by any other office. This method grew to be such a nuisance to the companies and claimants that the present Committee on Losses was organized to correct the abuses and reduce the expense. The business of loss adjustments has thus been put upon a more scientific basis and temptations and abuses that heretofore existed have largely disappeared.

My career as an adjuster came very near ending with the first loss left with me for settlement. At that time I was what was then known as an "application clerk" in an agency interested in the loss of the contents of a warehouse in Brooklyn. This warehouse was partly burned through exposure to a planing mill fire and a considerable part of its contents was removed to the streets and vacant lots in the vicinity. Part of the property thus removed was undoubtedly stolen and the assured frankly admitted that some of the stock scheduled was so lost. The surveyor of a local Company was acting for that Company in this adjustment, while I represented the agencies. On account of my inexperience this surveyor was allowed to do all the talking, and he secured admissions from the assured that certain of the property had been stolen. Some of this property, it seemed to me, the assured could very well have claimed was destroyed by the fire. On our way back to New York, he said that at our next interview, which would close the loss, he would let them know why he had asked the questions as to the stolen property. He said that the policy did not cover the loss of stolen goods. This, to my unsophisticated mind, appeared an unfair punishment to visit on people who had endeavored to minimize their loss and hence I told him that, while that might be the contract, I would rather give up the adjusting branch of the business and confine my activities to underwriting than enforce any such inequitable provision. On asking the agencies to relieve me of any further duties in this adjustment, explaining the reason, they to my astonishment said: "Never mind the contract, you do what you think is fair and just."

The adjuster of former days was not entirely free from physical risk. Today, either because the times have improved or we have become more diplomatic, the danger is entirely verbal. In any event, I meet no experiences like those of the earlier day.

In one case an assured in New Rochelle chased me out of his place with a knife in his hand and I may say that I willingly and quickly left the store as far behind me as my breathing apparatus would permit.

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On the day following that in which Mr. Gesswein was killed in John Street, I received a skull and cross-bones letter threatening my life unless I changed my methods of adjustment. Again in Plymouth Street, Brooklyn, I was obliged to threaten with a gun an Italian claimant who believed that I was preventing his collecting insurance for a loss which had occurred in Main Street. He was right in his belief and the company never paid for the claim which he made.

While it is humiliating to admit it, the advent of companies from abroad and from other States brought about a desirable change in the method of adjustments. It is true that some of the adjusters who came in shortly after this Surveyor Period had passed away, were still imbued with the notion of making the loss as small as possible, yet they were held up to fair treatment when complaints were entertained by the agents and officers of the various companies.

In those days the Fire Patrol had charge of the work of ruins, shoring, removing the salvage, arranging for sale, etc. This was taken out of their hands by resolution of the New York Board, I think about 1882, being due to irregularities discovered early in that year. It was charged that the time books had been tampered with and that other expense items had been increased to somebody's profit.

The salvage business was originally in the hands of one person, who was supposed to be very close to the Patrol Committee and who had stocks turned over to him without any check whatever, resulting in abuses which added materially to the companies' losses. Later, a competitor arrived, having the backing of several offices and uncomplimentary reasons were given by the supporters of each as to the motive of the other in favoring their special wrecker. This latter competitor, however, left town shortly after, when his creditors got after him, and is supposed to have gone abroad. He was examined in supplementary proceedings and among other questions was asked what he did with the \$16,000.00 cash which he had drawn out of the bank. His explanation was that he had it in his pocket and on the way up-town it was stolen and he had not advised the police of it as he knew it would do no good.

So great was the confidence in these wreckers that any criticisms of their methods by an adjuster was met with frowns; with veiled threats of withdrawal of patronage; and with the state-

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ment that the methods employed had always produced good results and that there was no reason for any change.

In one instance a check-out attempted by one of the adjusters resulted in his discomfiture. A large quantity of goods was removed surreptitiously by the wrecker, thus making the wrecker's account show some hundreds of dozens of shirts more than were shown by the adjuster's record. Through persistence, however, joint checking was finally adopted and salvaging was made more efficient and businesslike.

At some of the auction sales in those days certain people always seemed to be able to buy the rags and suspicion developed that sometimes these rags covered goods of value. One man in particular, who was the principal buyer of rags, found these sales a very profitable use of his time. Of course it might be assumed that someone gave him advice before the sale.

Gentlemen, believe me, these practices of the past do not appear to be in vogue today; or, if so, they are of such a kindergarten nature that no one is hurt. The adjuster of today scorns many of the practices of some of the old-time adjusters, and ethically he compares very favorably with the company officials, so that one may be proud of being in the profession.

Likewise, we have no such firebug gangs as were in existence in earlier days. There was a shoe-store gang with headquarters in Norfolk Street, a clothing and cloak gang with headquarters in Division Street, while another coterie conducted the small household furniture losses.

These firebug gangs operated largely in New York and New-ark, but after Mr. James Mitchel, Fire Marshal, father of the present Mayor, became acquainted with their methods, they made Brooklyn their paradise for a while.

In the clothing cases there were one or two previous claimants who acted as appraisers in later losses, so that they even had an appraisal bureau. The head of this gang, through the efforts of Mr. James Mitchel, was finally convicted and sentenced to 34 years imprisonment. They operated mainly from 1884 to 1892 and during the years 1892 to 1895 fourteen of them were convicted, with an aggregate term sentence of 288 years. These convictions were secured under the administration of the present Judge Vernon M. Davis, then District Attorney for this County. The evidence upon which the convictions were secured was gathered mostly during Mr. Mitchel's incumbency of the Fire Marshal's office. It was

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not, however, until 1897 that the head of the gang was convicted and sentenced to a 34 year term. Some data that I had accumulated was used for the purpose of cross-examination in these cases, and aided in a minor way to convince the jury of the guilt of those accused.

I might state right here that I am informed that everyone of these fourteen convicted persons has been pardoned through influence at Albany. The final clinching of the evidence that secured these convictions was brought about by District Attorney Vernon M. Davis sending to Germany for one of the so-called "mechanics" on the pretext of wanting him for an arson job in St. Louis. When he arrived in New York Mr. Davis endeavored to get his confession but failing in this, put him on trial and secured a conviction with a sentence of 48 years. Afterwards he confessed and through his evidence, with what had already been gathered, this head of the cloak gang was convicted and sentenced.

After they started to work in Brooklyn a loss in Greene Avenue was placed in my hands for adjustment. It was on furniture and clothing in an apartment house. The place was pretty thoroughly burned out and on my second visit many articles of wearing apparel were present which had not been in evidence at my first call. The explanation was made that they had been thrown out by the Fire Department and that boys had brought them back. As the loss was in a house directly opposite what is known by the Police Department as Jackson's Hollow, I suspected that it was another case of the hiring of burned goods. This case ran along for over four months with little progress toward a settlement, when one day the head of the Division Street gang appeared and asked if I wanted to settle the Greene Avenue loss. Since this was not one of the cases with his earmarks, but belonged to the household operators, I said to him: "For God's sake, have you people got a clearing house?" It was finally settled on terms satisfactory to the company.

Notwithstanding that Supt. Byrnes of the Police Department was told by the Fire Marshal and myself of this man's record and that he might burn out his own place in Division Street, he was not prevented in his design, and within six months of our visit he destroyed the building by fire. He then sued the companies; the latter, however, securing a substantial victory and the evidence brought out in this trial aiding later in his conviction.

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Another prominent leader of these gangs has recently been indicted for life insurance fraud, having been driven out of his fire activities through the efforts of Fire Marshal Mitchel. The man secured immunity for himself by turning State's evidence. His first activities were on the East Side, where certain evidence led to the belief that if he found, through one of his emissaries, that a tenant was without insurance, he would through another agent, and without the knowledge of the tenant, place a policy covering this tenant's household goods and later see that a fire was started. The crowded condition of these East Side tenements made this a comparatively easy feat. As the assured would truthfully state that he had no insurance, the insurance patrol would not be left to watch. Then this firebug would advise the tenant that he had placed insurance for him and that if he would keep quiet he would get something. Of course, with all his meagre worldly possessions destroyed; he would, in the words of the street, "fall for it" and take what little the firebugs chose to give him from the amount recovered from the companies. If questioned as to his statement to the patrol that he had no insurance, he would explain by saying that he did not speak English nor understand it very well.

A loss in Broad Street, where an assured was sole tenant of two buildings, brought about a claim, as I recollect it, of about \$30,000.00. The business was what is called the blending of liquors, and the component parts of this deviled stuff are almost impossible to discover. Therefore, if the formula book is fraudulent it is pretty difficult to disprove the claimant's statements. In this case, against the judgment of one of the adjusters, an appraisal was demanded. The contention of the company's representatives was that the loss was about \$1,000.00. Enough evidence was obtained to secure an indictment for presentation of fraudulent proofs, and at the trial it was proven that the appraisers had based their valuation on the details of the formula book and that this record was false and fraudulent. This claimant was convicted and the case carried through the Court of Appeals, where the conviction was confirmed. Later he was pardoned and had the temerity to bring suit against the companies for the amount of his claim. While the verdict was against him, the insurers were put to the further expense of defending a civil suit.

In connection with this case we had a detective from Pinkerton's that we selected on account of his having the stupid appear-

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ance of a German grocery-store clerk. We advised him to get close to one of the German employees who had a room in a house on the West Side of the city. He took the name we gave him, of Schmidt, and secured a room on the same floor near this employee. After a time he got on friendly terms with this employee and secured the information wanted. As soon as the trial started Schmidt was instructed to keep this witness in view night and day until he finally saw him in the witness chair and then he, Schmidt, was to disappear. When this witness was subjected to cross-examination a strong effort was made to find out who Schmidt was, and to the question as to whether Schmidt was a detective, his answer was, "Ach, no," and when further questioned as to who Schmidt was, he replied: "He is the son of old man Schmidt." It is needless to say the courtroom was convulsed.

A Frenchman who was pretty close to this assured obtained for us some information and agreed to get something further from a young French girl who was also acquainted with the assured. He agreed to take her one evening to a wine-room, where he thought the influence of liquor would loosen her tongue, and to report to us the next day. The next day he reported that while he expected to have her succumb to the wine which they drank, he found that, notwithstanding that he went shy several times, his condition was getting such that he had only to admit to us that he had failed in his mission.

A case that I had of a liquor saloon in Brooklyn, brought out one of the most interesting incidents of incendiarism that has ever come to my notice. It seems that the time was fixed for the mechanic to set the place on fire, but that the assured did not have the courage to drive his customers out at night on the pretext given him. The next day he was upbraided for his cowardice, taken in a carriage and driven over to South Brooklyn, where he was shown a handsomely furnished saloon with a large stock of liquors, which the operator told him was the result of a fire that he had started for these same people in another location, where they had had a very inferior place. In other words, like a salesman, he showed him the class of work that he was doing and took him to the sample line.

There was also another case in Brooklyn, where the son-in-law of an insurance broker collected several times for the same articles of wearing apparel and furniture. The father-in-law being an insurance broker, would place three policies in three dif-

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ferent offices and then notify first one and get the loss adjusted, then the same with Company number 2, and again with number 3, in each case declaring there was no other insurance. This he could readily do at this time, knowing, for instance, that Mr. Noxon would be the adjuster for the German-American, Mr. Wiltsie would be the adjuster for the Star and Mr. Pitcher the adjuster for the Royal. He was finally exposed by reason of one of the adjusters being sick and absent from the office when one of his losses was reported to the company. He was later convicted for presenting false proofs and served a full sentence.

The first conviction for presenting false and fraudulent proofs under the Code, was in connection with an essential oil case where a claim was made for some \$18,000.00 for essential oils supposed to have been burned up in a basement store-room. The assured in this case had had one previous successful loss claim. This one, however, proved to be his undoing and he served time. It, however, took two trials to secure his conviction, each of which trials lasted over a week. In the preliminary examination in the Magistrate's Court, the Fire Marshal was so incensed that the matter had not been left in his hands, that the adjuster acting was informed that the man would never be held for the Grand Jury. Since this adjuster had been somewhat indiscreet in some uncomplimentary remarks he had made to, and about the Fire Marshal, and fearing his political influence, the adjuster deemed it wise to find some friend of the Judge. Remembering that a good friend of his had married a ward of the Judge, he explained the situation to him. He promised to be present at the next hearing and to let the adjuster know just what the Judge's feeling was. He also asked the adjuster to be as familiar with him as possible and thus attract the Judge's attention. By appointment and just before the afternoon session of the Court, he advised the adjuster that he had had a talk with the Judge during recess.

The warrant for these tactics of mine was evidenced by the fact of the subsequent conviction.

Col. Fellows was the District Attorney who tried this case, and one important feature was the claim that the essential oils were in a hair-covered trunk which was taken into the basement of the building. At the second trial, the jury disagreeing at the first trial, we had a diagram of the basement prepared, leaving entirely blank the space actually occupied by a counter and shelves which were along the East wall, so that it showed nothing between

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the wall and the middle counter, which was about 12 feet away from the wall, hoping that the claimant in his testimony would indicate that this trunk was in this space. He fell into the trap and repeatedly insisted that the trunk had been directly against the brick wall. In the afternoon we presented a full and accurate plan of the basement, showing a 6 ft. counter extending from this Eastern wall into the room for the whole length of the building, and then he was obliged to state that he did not mean against the wall, but against the counter. The effect of this on the jury was strong and at once apparent. We presented expert testimony to show that a very strong and lasting perfume accompanied the burning of essential oil and in support of this evidence, during the trial, lit two or three matches which had previously been dipped in the oil and, the court-room became permeated with an odor which lasted for two or three days. At the close of the day when these matches were burned, Col. Fellows addressing Judge Barrett, who was presiding, asked him for a certificate that he might take to his wife to account for his perfumed clothing.

While we had to have two trials with about 40 witnesses, the assured was finally convicted. I might state here that the expense of that conviction, which necessitated an examination before a Magistrate, and two trials of over a week each, including lawyers' fees, legal expense and detective work, amounted to somewhat less than \$8,000.00, so you can see that the high cost of living makes these expenses much larger now.

A loss on a stable at Jerome Avenue, where there was insurance of \$25,000.00 on horses, harness and vehicles, brought about the conviction of the leader of the stable gang and the cessation of those fires. The man convicted was but one of a family. Insurance in the father's name had been collected for a previous fire and another claim in the mother's name had been successfully maintained, but the increased amount for which the son had insured, with the evidence that was in the ruins, brought about his undoing. We proved that the horses that had been taken up to this barn were what are known as "skates," having been purchased from the Second Avenue Railroad Company, while the bills for vehicles which he had from some of the gang, were proved false by reason of the weight of vehicle iron which we found in the ruins.

One remark made by a disgruntled member of this gang, from whom we tried to obtain information that we knew he was

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possessed of, has remained in my memory. He stated that he would not have anything to say in the case, because as he paradoxically affirmed, the assured, mentioning his name, "could swear a hole through a ladder."

Another interesting case was that of a loss on a bag factory, where the invoices, the cash book, the ledger, the journal and the check book all demonstrated the accuracy of the account. But it turned out that two of the bills had been sent to the assured with a statement that when his check was received the goods would be sent, and as no check was forthcoming the goods were never sent, although the check book and cash book showed the payment.

There were other very interesting things in connection with this claim and it was only when he was asked for the returned bank vouchers that he fell down. His bank pass book was taken to the bank and there it was learned that after the fire he had stated that his pass book had been burned and he wanted a new book. The old book he had written up, showing deposits and return checks, so that even the president of the bank believed it genuine, but it turned out that he had added \$1,000.00 to the last bank balance shown on the pass book, and had made his deposits and his drawings agree with his other books. It is needless to say that nothing was paid for this loss. Later, however, the big fire which burned in South Street, Moore Street and Whitehall Street I believe was directly chargeable to this same person.

The loss of a towboat which was tied up at the Whitestone Dock developed the fact that while the captain and the engineer went ashore to sleep, the crew was left on the boat and that when the fire broke out the crew rushed for the fire buckets, threw their contents on to the fire, which added to the flames, as instead of water, it was oil which was in the buckets. The crew had to jump overboard to save their lives.

Alleged followers of art are not free from commercial weakness nor the acquisitive desire. A claim was made for loss to one painting, insured under a schedule for fifteen hundred dollars (\$1,500.00). The name of the artist given in the policy form was that of one of well-known reputation. With an artist who was familiar with the paintings of various artists, and who knew also their commercial value, I visited the premises in Fifth Avenue where the fire occurred. There was remaining of the picture the four corners, the flame having burned an oval hole through the canvass, the stretcher being untouched by the fire.

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It was not by the artist whose work it was claimed to be, as the expert knew that the canvas was not such as was used by that artist, and the parts of the painting showing the sky were not indicative of his work. An appraisal was had, which fixed the value and loss at one hundred and fifty dollars (\$150.00). The assured refused to accept the award and brought suit.

At the trial, in an attempt to show that the picture was a total loss and thus prove that an appraisal was valueless, the remains of the picture were produced. As thus shown, it was entirely void of canvas, and the stretcher had been badly charred. However, three of us had seen it immediately after the fire, and hence the company secured a verdict and paid nothing to the assured.

Another claim of this same nature was disposed of by paying about one-quarter of the schedule values, there being enough evidence to show that the paintings were not genuine.

It seems to me that there is more humbug in the dealings in oil paintings, than in any other class of merchandise and that it would be well to scrutinize carefully every offer of insurance on works of art, whether under a schedule or otherwise.

Of all claimants the Chinese are the most patient, never complaining of stoppage of business, loss of customers, etc. In one case, after three months' delay, an appraisal was held, the companies selecting a Chinese missionary, the assured a Chinese editor, and these two selecting a Chinese merchant as umpire. The award was very satisfactory to the companies at least and the assured as pleasant as ever, although the award was very much below the claim.

A loss notice was sent to me, with the location of the furniture at Canarsie. The claim was fifty cents, and the insured technically right, insisted he was justified as there was no minimum non-liability on the part of the company, and therefore he wanted his rights. He got them by producing at the company's office in New York City a proof of loss sworn to, and his policy.

You should not always believe that a suspicious fire is caused by the assured. This was evidenced in a case that we had where a small German manufacturer who had been in the premises about four years placed insurance at the instance of a new tenant, and within two weeks thereafter a fire occurred in this German's premises. Fortunately for him the man who occupied the floor above and into whose premises the fire burned, was under surveillance by Mr. Mitchel, Fire Marshal, and was convicted of setting the place on fire.

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In another case, in Brooklyn, in a two-family house the fire apparently occurred in a closet, but with so little evidence of fire, that we had some of the garments brought to the office and they were of such a character that it did not seem possible that anybody would have desired to burn them. We had the burned spots analyzed by a chemist, who found that sulphuric acid had been used to destroy the garments. It developed that the co-tenant had had some differences with the assured in real estate matters and while this assured was absent, had gotten into the premises and destroyed the clothing with acid.

In my experience the Hebrews hold the pennant for fairness. A loss was settled with a firm dealing in skins, and an agreement signed fixing the amount of claim as \$40,961.40. Shortly thereafter a lawyer called, stating that the assured would not accept the sum fixed, as by our prompt action some goods that we all felt would suffer damage had turned out to be perfect, the only loss thereon being the expense of handling. Later they advised me that the goods sent to Liverpool had turned out worse than our estimate, but the net saving was \$4,921.30, which they insisted should be deducted from the agreed figure, making the loss \$36,040.04. The pennant is still up for the Gentiles to strive for.

A loss on Long Island, destroying a barn and its contents placed a novel interpretation of a policy form.

The policy was divided into four items covering the barn contents and described them as "all being contained in the frame barn" &c.

In the schedule of claim were a number of things enumerated which were not covered by the policy form.

The assured insisted, however, that the words "all contained in the barn" meant everything therein. Discussion did not change his opinion. He appealed to the Manager of the Company; not receiving any support of his view there, he appealed to the Trustees with a similar result, and finally wrote to the office in London. For he was an Englishman with bull-dog tenacity.

Some comical things occur, and I am reminded of an Irish lady who had in her schedule of claim among other things an eight day clock valued at \$18.00. The works were recovered from the ruins and she was informed that their evidence showed that the clock was only worth about \$4.00, to which she replied: "Four dollars for an eight day clock—only fifty cints a day!" In con-

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sequence of this clever remark and believing that she had been badly advised, I felt compelled to treat her liberally.

Recently an assured in Front Street presented a claim for cigars destroyed, that seemed absolutely impossible to be true and consequently suspicion rested upon the assured as to the origin of the fire. It turned out, however, that a party had rented the top loft of a building on Maiden Lane, which was up against this Front Street building, and that these parties, three in number, had only occupied this place for a month and had stolen a lot of cigars by going over the roof and then had probably set the place on fire.

They were finally caught with the goods in their possession in a building on 14th Street, and were arrested and afterwards convicted, each of the three having previous prison records. It is believed that they have set other fires in New York, by corrupting the porters and thus getting into the premises and stealing goods.

Human nature still remains weak and incendiary fires will continue to be met, but they can be minimized in my opinion if the present method of investigation is changed. On this subject Judge Davis said when he was District Attorney: "As to the best agency for the detection of these criminals and for the gathering of evidence against them, I am convinced that in addition to the efficient and the necessary aid given by the police and the Detective Bureau of this city, the district attorney should have his own secret agents and the fund for paying them.

Prevention of this crime should be the end. It is as important, and I believe as practicable, as prosecution. The secret agents would move among criminals of this class and report their intentions and plottings in time to circumvent them. Arson would thus be difficult and dangerous for the incendiary. This method has already been used successfully."

To the young gentlemen of the Insurance Society I am expected to offer some word of advice, some suggestion on the procedure of an adjuster. I wish it were possible to suggest your going to some college where a chair had been endowed, that the subject of adjusting fire losses might be added to the curriculum. This advancement in science has not yet been attained.

It is beyond me to instruct in this line, but to succeed as an adjuster you must have tact, horse sense and become a judge of human nature.

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What makes an adjuster? Who is qualified to be an adjuster and who not? How can a man tell whether he is by nature justified in the attempt to qualify himself as an adjuster?

An adjuster is sent by an insurance company in these modern times firstly to verify the justice of a claim presented by a policyholder and secondly, to determine the equity of the claim under the contract, its various provisions being considered. He will find a necessity for some understanding of bookkeeping methods, a still greater necessity for a reasonable ability to judge human character. He will find that he does not do wisely if he believes all claims dishonest and starts out to prove them so. He should be as anxious to remove as to confirm a suspicion. Vastly the greater portion of the human race is honest and do not make fraudulent claims. By far the majority of policy holders never have a claim nor a fire loss.

To the business man, who after an experience of years is suddenly confronted with a partial or total destruction of his plant and whose only safeguard against bankruptcy may be his fire insurance contracts, a very serious situation arises. Is it unnatural that we should credit him with a degree of nervous apprehension? Is it unnatural that we should find him disposed to over-estimate his loss, to conjure up mentally a picture of a grasping monopoly determined to pay him a fraction only of what he supposes himself to have actually lost, to ruin him completely as to his future business career? Adjusters are handling fire losses all day long; we are familiar with them. They have no terrors of the unknown for us. Is it unnatural that a self-possessed experienced adjuster who has himself well in hand and who can talk rationally and convincingly to such a claimant should later find a very great modification in that claimant's demands? Would you think that such a claimant deserved to be blacklisted so as to be avoided as an insurance risk in the future? I don't.

I say that an adjuster needs more than usual control over his temper, more than the usual disposition to painstaking investigation, a strong inclination to faith in human nature, a determination to be certain that what he certifies is right, a reasonable acquaintance with many lines of business, a strong bump of anti-panic in his make-up and with all—an abiding faith in the honest intention of men. A little touch of humor will be found a great insurance against friction. Don't imagine that I overlook the value of firm-

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ness; don't imagine that I underrate ability to clearly indicate that fraud will meet its deserts, but on the other hand, remember that you represent a contract of indemnity and that indemnity that doesn't indemnify is a misrepresentation.

Finally I say have tact, more tact, and then some.

XXX

THE DOCTRINE OF SUBROGATION IN ITS PRACTICAL APPLICATION TO INSURANCE

GEORGE RICHARDS, Lawyer

This subject embraces one of several peculiarly interesting doctrines, which are forced upon contracting parties by the law, where their contract is silent regarding the matter or does not fully cover it (*Loewenstein v. Queen Ins. Co.*, 227 Mo. 100, 127 S. W. 72.) This subject also has a peculiar interest for the prudent underwriter because it suggests to him immense possibilities in the way of reimbursement for losses paid.

WHAT IS THE DOCTRINE OF SUBROGATION?

The word "subrogation" means a substitution of one person in place of another. Suretyship furnishes a simple illustration. The individual surety usually acts gratuitously. If he is called upon to bear the load of his friend's debt, vicariously, it is plain enough that he thereby becomes entitled to all the rights of the creditor against the principal debtor, and to the benefit of all collateral securities held for the debt (*American Bonding Co. v. Bank*, 97 Md. 598, 605). Thus the Pennsylvania court declares: "Subrogation in suretyship is a mode which equity adopts to compel the ultimate discharge of the debt by him who in good conscience ought to pay it, and to relieve him whom none but the creditor could ask to pay." (*McCormack v. Irwin*, 35 Pa. St., 111, 117.)

With suretyship thus freshly in mind let us press on to our immediate subject.

SUBROGATION IN ITS PRACTICAL APPLICATION TO INSURANCE.

What are the controlling reasons underlying the doctrine? Are they the same as in the law of suretyship? And to what practical conclusions do they lead?

In fire insurance the most common instance, involving the operation of subrogation, is where a common carrier or other third party has negligently caused the loss. (*Gangler v. Chi., M. & R. S. Ry. Co.*, 197 Fed. 79; *Connecticut Fire Ins. Co. v. Erie Ry. Co.*, 73 N. Y. 399.) The insured party has been indemnified by his underwriters, and the underwriters in turn invoke the doctrine of subrogation to secure, if possible, from the wrongdoer, or *tort*

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feasor, as he is technically called, a recoupment to the extent of their payment. Why is the claim to subrogation on the part of the underwriters in such a case recognized as fully justified? In scrutinizing the opinions of the judges, we find that two reasons are often referred to in explanation which really are quite distinct, but which frequently are more or less commingled in the opinions of the courts.

REASONS FOR THE DOCTRINE.

First Reason:—The party who has wrongfully caused the loss ought to bear the burden of it, unless he has himself contracted for the benefit of the insurance. (*Stoughton v. Gas Co.*, 165 Pa. St. 428; *Hall v. R. R. Cos.*, 13 Wall, U. S., 367; *St. Louis I. M. & S. Ry. Co. v. Commercial Union Ins. Co.*, 139 U. S. 223, 235.)

This reason, analogous to that applicable in suretyship, good as it is, is not altogether satisfactory, because it wholly fails to explain many well established instances of subrogation.

Second Reason:—Based not only upon the express terms of the contract between insurer and insured, but also buttressed by important considerations of public policy, is the underlying principle of insurance law that the liability of the insurer to the insured for a loss must be limited to indemnity.

I can offer you no finer statement of this principle than that of Mr. Justice Brett, Lord Esher, as employed by him in a leading and famous case:

"In order to give my opinion upon this case, I feel obliged to revert to the very foundation of every rule which has been promulgated and acted on by the courts with regard to insurance law. The very foundation, in my opinion, or every rule which has been applied to insurance law is this, namely, that the contract of insurance contained in a marine or fire policy is a contract of indemnity, and of indemnity only and that this contract means that the assured, in case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified. That is the fundamental principle of insurance; and if ever a proposition is brought forward which is at variance with it, that is to say, which either will prevent the assured from obtaining a full indemnity, or which will give to the assured more than a full indemnity, that proposition must certainly be wrong. * * * Now, it seems to me that in order to carry out the fundamental rule of insurance law, this doctrine of subrogation must be carried to the extent which I am now about to endeavor to express, namely, that as between the underwriter and the assured the underwriter is entitled to the advantage of every right of the assured, whether such right consists in contract, fulfilled or unfulfilled, or in remedy for tort capable of being insisted on or already insisted on, or in any other right, whether by way of condition or otherwise, legal or equitable, which can be, or has been exercised or has accrued and whether such right could or could not be enforced by the insurer in the name of the assured, by the exercise or acquiring of which right or condition the loss, against which

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the assured is insured, can be or has been diminished. That seems to me to put this doctrine of subrogation in the largest possible form, and if in that form, large as it is, it is short of fulfilling that which is the fundamental condition, I must have omitted to state something which ought to have been stated."

Castellain v. Preston, L. R. 11 Q. B. Div. 380, 52 L. J. Q. B. 366; 49 L. T. N. S. 29. To similar effect, Chi., etc., Ry. Co. v. Pullman Car Co., 139 U. S. 79, 88; Packham v. German Fire Ins. Co., 91 Md. 515, 523; Monteleone v. Royal Ins. Co., 47 La. Ann. 1563.

RIGHTS ARE INCLUDED WHETHER BASED ON TORT, CONTRACT OR OTHERWISE.

In pursuing our inquiry it will be interesting to examine a number of special instances.

In a case in the federal Supreme Court counsel for the defendant, a common carrier, urged against the claim to subrogation that no tort or negligence or wrongful act of any sort had been shown to have been committed by the common carrier, and that the owners' right of action against the carrier for failure to deliver the goods was based merely upon rigid rules of the common law making a common carrier liable even for accidents, but the court held that by such an argument no defence was shown, and that, inasmuch as the insured had a right of action against the carrier, which aimed to satisfy the loss, the underwriters, upon payment of the loss, became equitably entitled to the same right of action whatever its basis. (Hall v. Railroad Companies, 13 Wall., 367.)

In like manner, before the Colorado court, counsel for the railroad company contended that there could be no subrogation because a statute made the common carrier absolutely liable for the fire loss without proof of negligence and that no such proof had been furnished. The Colorado court, however, held that underwriters were entitled to subrogation regardless of negligence or wrong doing by the carrier. (Crissey, etc., Co. v. Denver & R. P. R. Co., 17 Colo. App. 275; British Amer. Assur. Co. v. Colo. & S. Ry. Co., 1912, 125 Pac. 508.)

Quite analogous to the rule which we have already considered in the law of suretyship, most of the courts have had no difficulty in applying the doctrine of subrogation to the case where the insurance is taken out and paid for by a mortgagee solely for his own benefit. (Carpenter v. The Providence Wash. Ins. Co., 16 Pet., U. S. 495; Excelsior Ins. Co. v. Royal Ins. Co., 55 N. Y. 343; Thomas v. Montauk Ins. Co., 43 Hun, N. Y., 218; Norwich F. Ins.

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Co. v. Boomer, 52 Ill. 442; Dick v. Franklin F. Ins. Co., 10 Mo. App. 384, aff'd 81 Mo., 103; Bound Brook S. Ins. Co. v. Nelson, 41 N. J. Eq. 485.)

The Massachusetts courts, however, adopted the contrary view, and in repeated decisions held that the underwriters having been paid the full equivalent for meeting the loss must be left to sustain this loss, although it result in a double indemnity to the mortgagee. (King v. State Ins. Co., 7 Cush. 1; Suffolk F. Ins. Co. v. Boyden, 91 Mass., 123; International Trans. Co. v. Boardman, 149 Mass. 158.)

In a very elaborately considered case an insured owner of a building made an executory contract of sale, pending the fulfillment of which, a partial loss by fire occurred, which was adjusted with his underwriters and paid by them. Subsequently the sale was consummated under the pending contract and the full purchase price paid to the vendor. Thereafter the underwriters brought suit against the vendor to recover back the total amount paid by them under the policies. The insured claimed that the adjustment with his insurers could not be opened, and that what he had since collected under his contract of sale was of no concern to them, but the court were of the contrary opinion, and the efforts of the underwriters were crowned with complete success. (Castellain v. Preston, L. R., 11 Q. B. Div. 380.)

This important case was decided by the English Court of Appeal in 1883, but long before this time, namely, in 1836, our Chancellor Walworth had in a dictum laid down precisely the same rule. (Aetna F. Ins. Co. v. Tyler, 16 Wend. 385, 397.)

In another interesting English case a landlord was insured against loss by explosion, but the tenant had also covenanted in the lease to repair any such loss. A loss occurred, which the underwriters paid, and which the tenant subsequently repaired. The underwriters thereupon brought action against the insured, and recovered back all that had been paid under the policy. (Darrell v. Tibbitts, L. R., 5 Q. B. D. 560.)

It will readily occur to us that some of these cases of subrogation to mere contract rights offer a very interesting subject for our thoughtful consideration. The insured has the benefit of two independent contracts, the one with an insurance company, the other with a third party, for example, a lease with covenant by the tenant to repair. Both these contracts are based upon valuable considerations. No question of tort or wrong is involved. Where shall a loss

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be put? Can it be said that either the tenant or the underwriter is primarily liable as compared with the other? Is the tenant the real insurer, rather than the insurance company? Shall the loss be apportioned between them under some principle of contribution, on the theory that both alike are insurers? These questions are intensely practical. There are outstanding in this state multitudes of leases containing covenants on the part of tenants to repair. Every underwriter's office and every large broker's office will confess to an interest, either personal or representative, to an untold amount connected with leased premises. And what is the law? Where are these losses ultimately to rest as between underwriters and third parties, both under contract with the owner to meet the loss?

In this country there is an amazing lack of decisions covering these precise questions. One would have supposed that just such issues would have come before the American courts scores of times. In my own experience I have known of a number of instances where tenants have taken leases of furnished houses for limited periods in the summer, two or three or four months, covenanting to make good any loss that might occur to real or personal property. The property in a given case may be worth, say, twenty or thirty thousand dollars, and the whole rent very likely not more than one hundred and fifty dollars a month; the landlord who owns all the property has insured it; the tenant does not own it and has no insurance upon it. In many instances the tenant might give very little heed to any such question of liability created by the lease, and might really suppose that he was simply guaranteeing against some trivial or improbable act of negligence on the part of his servants, relating more especially to wall papers and floors and personal property. The place burns up; who is ultimately responsible for the loss, the underwriter or the tenant?

One of our most excellent writers on the subject of insurance law was Mr. Jolin Wilder May, whose two volume book on insurance, published in Boston, has gone through several editions. When the famous case of Darrell against Tibbetts was decided by the English court in favor of the landlord's underwriters and against the landlord who sought to keep his double indemnity, the one indemnity received from the underwriters and the other from the tenants, Mr. May seemed somewhat staggered. In the next edition of his book he refers to the case as involving "a strict, not to say new, application of the principle of indemnity"; and in a foot note he adds the following comments: "That the [insurance] contract is one of in-

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demnity has been heretofore conceded elsewhere than in England as elementary, nor are we aware that it has ever been seriously controverted. But it has been supposed that the insurer contracts that *he* will indemnify. Whether, however, this application of the doctrine will receive the approval of *our* courts remains to be seen. It certainly deals rather summarily with rights acquired under lawful contracts, lawfully executed, where the considerations are equivalents, which cannot be rescinded or modified except by the parties thereto. It should be added that when the insurers paid over the indemnity they did not know that the lessee was bound to repair." (May on Ins., sec. 456 a.)

The remarks of Mr. May just quoted are forcible so far as they go. But I insist we must go further. The pith and point of our inquiry must be this: Shall the law permit the insured public, including bad men and good men alike, to utilize their insurance contracts as a source of profit? Are such calamities as conflagrations and shipwrecks, imperiling the safety of the public at large, to be converted by canons of insurance law into pecuniary blessings to individuals who are insured against their occurrence, events not to be dreaded and guarded against, but to be hoped for and prayed for, and by unscrupulous men planned for and labored for? If the law allows any man to make a huge profit by his insurance contract, then many a man will deliberately take out and hold insurance with that result in view. And what sort of a situation then shall we have in the community?

A man owns a house worth not over \$10,000; it is insured to that amount; he contracts to sell it for \$10,000, and is delighted with his bargain. May he collect and keep his \$10,000, received from the purchaser, and \$10,000 more clear profit received from his underwriter, and thereby realize from the sale and the fire combined \$20,000? If so, he will certainly be apt to welcome a fire, and if he does not deliberately drop the spark that occasions destruction, it is not likely that he will use any special precaution to prevent it.

Mortgagees find it difficult indeed to realize more than five percent interest on their loans in this city. Think then of doubling the whole principal and perhaps within a few days after the loan is made! The mortgagee has paid out \$10,000 as a loan, and that, one would suppose, is the total amount of principal which he is to recover back. Shall he collect and keep \$10,000 from the

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the ground that the plaintiffs had no insurable interest and that the contractors were the real parties in interest. The court, by Chief Justice Andrews, and without any dissenting opinion, had this to say:

"The defendant by its contract undertook to insure the plaintiffs against loss by fire not exceeding the sum specified to the described property. The loss or damage to be ascertained according to the actual cash value of the property at the time of the fire. The parties by this contract made the value of the property insured, within the limit, the measure of the insurer's liability. * * * The defence comes to this, that as the plaintiffs, by their contract with third persons have imposed upon them the risk and expense of furnishing complete structures and have assumed no liability until the structures are completed, they had no insurable interest and have sustained no loss. But the contract relations between the plaintiffs and the contractors is a matter in which the defendant has no concern. When the policy was issued it could not be known whether the contractors would perform their contract. If they abandoned it the owners would derive such advantage as would accrue from the partial construction of the building prior to such abandonment. It is possible that if the defendant is compelled to pay the policy the plaintiffs may, if they insist upon their rights against the contractors, get double compensation, unless they should be adjudged to hold the fund recovered for the contractors. But, however this may be, the owners had an insurable interest to the whole value of the buildings on their land and the defendants neither can compel the plaintiffs to put the loss on the contractors nor can they resort to the terms of the building contract to diminish the liability for an actual loss within the terms of the policy. The fact that improvements on land may have cost the owner nothing, or that if destroyed by fire he may compel another person to replace them without expense to him or that he may recoup his loss by resort to a contract liability of a third person in no way affects the liability of an insurer in the absence of any exemption in the policy."

To a proper appreciation of the opinion just quoted it is essential to remark that no question of subrogation was presented to the court either by the pleadings or by the argument of counsel, or was in any way involved. The decision of the court was doubtless correct, since as a matter of fact the title to these buildings was in the plaintiffs, and the contractors had not, up to the time of the trial actually reinstated or rebuilt, in whole or in part; therefore the present liability of the insurance companies was clear and was unaffected by the building contract, and probably no thought of possible future subrogation was in the mind of Chief Justice Andrews when he framed his opinion, else I am fully persuaded he would have been more guarded in his phraseology. Standing by itself I do not think that the *Foley* case amounts to much one way or the other as bearing upon any question of subrogation.

Several years later, however, namely in 1902, the *Buffalo Elevating Company* case came up before the same court (*Michael v. Prussian National Ins. Co.*, 171 N. Y. 25). There the insured

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company had some \$70,000 of use and occupancy insurance. Nevertheless, it had turned over or assigned the great bulk of its prospective earnings for the pending season to the Western Elevating Association, a pool of many grain elevators, under a secret arrangement undisclosed to the insurance companies, whereby, in spite of a fire, it was to receive its full income or percentage of earnings as a member of the pool. Subsequent to the fire, as appeared by pleadings and stipulation, it actually had received a very large remittance of this character from the pool, and under this very doctrine of indemnity the insurers of use and occupancy contended that the subsequent remittance from the pool should be credited to them in diminution of their liability as insurers. The court held, and I think rightly, that this contention of the insurance companies was unsound. But to the reasoning of the court we may find ourselves unable to lend our cordial acquiescence. A valid ground for holding that the insurers were not entitled to that reduction was this, that there was absolutely no proof before the court establishing the total value of the subject of insurance. The courts will never willingly apply subrogation if it would interfere with indemnity (*Phoenix Ins. Co. v. First Nat. Bank*, 85 Va. 767). The rule of indemnity works both ways and in favor of both parties. For aught that conclusively appeared in the record of that case the insurance plus the remittance from the pool did not exceed the full value of the subject insured. The policies were in the customary form, a per diem allowance for each day of idleness caused by the fire. If the plaintiffs took out \$10,000 of insurance, the total per diem allowances would amount to a certain sum. If they took out \$100,000 of insurance, the total per diem allowances would amount to ten times as much, but there was no agreed valuation in the policies, nor were the plaintiffs under obligation to take out any particular amount of insurance, and, therefore, there was nothing before the court to demonstrate the actual total value of commercial use and occupancy for the pending year. Subrogation, strictly speaking, was not applicable to this case for another reason also, to which the court alludes, namely, that the underwriters had not yet paid the loss. But the ground for their ruling upon which the court laid special stress was that earnings and income constituted no part of the subject matter of the use and occupancy insurance. In the opinion, Mr. Justice Gray makes the following statement regarding subrogation:

"The appellants' claim, to be entitled by application of the equitable

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doctrine of subrogation to be credited with a proportionate share of the percentages or moneys received by the plaintiff from the association in reduction of its liability upon the policy, is not a tenable one. * * * The Western Elevating Association might conceivably with better appearance of right prefer the claim to be subrogated as to the insurance moneys in order to recoup itself for the moneys paid over to its disabled member. * * * I think the principle of the decision of *Foley v. Manufacturers & B. Fire Ins. Co.*, 152 N. Y. 131, relied upon at the Appellate Division as to this point is applicable. There the policy was upon some dwelling houses in course of construction and they were destroyed by fire. The contractors for their erection were obligated to complete them before becoming entitled to be paid for the materials and work, it was held that the insurance company was not concerned with the contract relations between the plaintiff and the contractors. It was said that it is possible that if the defendant is compelled to pay the policy, the plaintiffs may, if they insist on their rights against the contractors, get double compensation unless they should be adjudged to hold the fund recovered for the contractors. * * * Again it was observed that though the owner may recoup his losses by reason of a contract liability of a third person, it in no way affects the liability of an insurer in the absence of an exemption in the policy. The case is very much in point as an authority for the disposition of this appeal. The theory of the right of subrogation rests upon the fact that the assured have a claim against a third party for the loss which has been sustained in the destruction of the property insured. That is not the case with the plaintiff who did not receive his payment from the pooling fund because or in consideration of the loss, but under an arrangement which had secured to the members of the association certain percentages under all conditions as a consideration of entering into it."

If these remarks of the learned New York judge are to be taken as a general exposition of the law of subrogation by our highest court, as many have supposed they must be, the situation is indeed serious. But I do not think it necessary to understand them in that light. No issue of subrogation proper was really involved in the decision of the grain elevator case. The doctrine of subrogation was presented rather as an argument to persuade the court that the plaintiff's claim was utterly inconsistent with the sound doctrine of indemnity. The Court of Appeals had before it the English and federal cases relating to subrogation, but did not review or discuss them, or declare that there was any intention on the part of the court of departing from them. The seeming approval of the theory that the insured may recover and retain, as the proceeds of both his contracts, a double compensation, may be regretted, and perhaps amounts to an unfavorable dictum as applied to our present inquiry, but, so far as the law of subrogation is concerned, I am disposed to think we should regard Judge Gray's opinion as amounting rather to some such statement as this, to wit: "Whatever may be the law of subrogation, the court concludes, that it has no application to this case, for two reasons; first, because the underwriters have not as yet made payment for the loss, and

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second, because the subject matter of the insurance is not the same as the subject matter of the pooling agreement."

The real defense in that case was this: That the assignment and turning over by the elevator company of its earnings to a third party, to wit, the pool, amounted to a "change of interest," and that the elevator company thereafter was not the "sole and unconditional owner" of the subject matter insured. The Court of Appeals, in its opinion, conceded that the subject matter of this class of insurance is "the business use" of the premises, and so the underwriters in that case contended; but they further contended that the earnings and income of the elevator constituted a very real and substantial part of that business use. And the strength of their contention is illustrated by the argument that the assignee, to wit, the pool, could conceivably, in its turn, have insured these same assigned earnings under the denomination "use and occupancy," and the next assignee could have done the same, and so on *ad infinitum*. Several different successive owners, it would seem, cannot each at the same time be the sole and unconditional owner of a given subject matter (Fuller v. Jameson, 98 App. Div. 53).

Brushing aside all technicalities, the situation in this important elevator case, though not spread before the court in detail by the agreed statement, amounted very much to this: The elevator company had insurance on their buildings and on the contents. Besides this, they had upwards of \$70,000 use and occupancy insurance. When the elevator was razed to the ground by the fire, their operating expenses were, of course, very largely diminished, if not totally suspended, while, owing to their agreement with the pool, which controlled abundant elevator capacity in Buffalo, their income remained substantially the same. So far as any practical meaning, in a commercial sense, can be attached to the words, there was no loss to the insured of "use and occupancy;" there was rather a gain. Nevertheless, for an alleged loss, not a dollar of which, probably, was really sustained, they were allowed to collect over \$60,000 on their use and occupancy insurance.

Whether the judgment of the court was lawful or unlawful, just or unjust, matters little for our present purposes; the relevant inference is this, that we must not regard that decision as necessarily controlling when we are seeking only to investigate the law of subrogation; and when in future the proper case of subrogation shall arise, do not for one moment hesitate to present it before

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the judges of that high tribunal with considerable confidence that they will and must approve of the application of the sound rule of "indemnity only" already sweepingly applied by the English and United States Supreme Courts, and this year enforced by the New York Supreme Court, in a somewhat different connection, in the case of *Heilbrunn v. German Alliance Ins. Co.* (135 N. Y. Supp., 769, 150 App. Div., 670). And now it is with special gratification that I refer you to the views of two New York jurists of more ancient times, Chancellors Kent and Walworth. In a case to which I have already alluded, *Aetna Fire Ins. Co. v. Tyler* (16 Wend. 385), involving an executory contract of sale to the plaintiff Tyler, Chancellor Walworth lays down the following principles, citing also a much earlier opinion by Chief Justice Kent:

The vendor Shafer, indeed, could not recover that money (the purchase price) and retain it for his own benefit after he had been paid by his underwriters; but it could be collected in his name for the benefit of such underwriters, as they are in equity entitled to all his rights and remedies if they pay the amount of his loss. This principle of equitable subrogation or substitution of the underwriters in the place of the assured, is recognized by every writer on the subject of insurance, and is constantly acted upon in courts of law as well as in equity. * * * Thus, in the case of *Gracie v. The New York Insurance Company*, 8 Johns, R. 246, where the assured recovered to the full amount of the policy upon a condemnation of the vessel and cargo under the Berlin and Milan decrees, although there was no abandonment of the *spes recuperandi* against the French government, Chief Justice Kent says that if France should at any time hereafter make compensation for the capture and condemnation, the United States, upon the receipt of the money, would hold it as trustee for the party having the equitable interest therein; and that would clearly be the underwriter.

If these remarks, which I have just quoted, fairly embody the law of this state as it exists today, and I am not aware that they have ever been overruled, then have those of you who are underwriters much cause for hope as regards the ultimate solution of the interesting problems which I have endeavored to set before you. Observe that in the Tyler case the right under discussion was the right to a purchase price, a right based simply upon an executory contract of sale with a third party, a purchase price that had to be paid to the vendor regardless of any question of fire, insurance, or loss; and to that mere contract right our old Supreme Court of Judicature declares this doctrine of subrogation will undoubtedly attach, for the reimbursement of underwriters who have already indemnified the vendor. In these clearly expressed views of two of our most illustrious judges, do I not bring to you an encouraging offset to the dictum contained in the Foley case, afterward quoted

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in the elevator case, regarding an allowance of double compensation to the insured? In conclusion a word as to

CONTRIBUTION.

Has the third party who is prosecuted under the doctrine of subrogation a right to an apportionment of the loss as between himself and the underwriters of the insured? Where the third party is responsible for the loss, or is primarily liable, as for example, in the case of a common carrier, or the owner or master of a steamship, or a wharfinger, it has been expressly held that no claim of contribution is to be allowed in his favor, whether he has been negligent or not (*The Atlantic Ins. Co. v. Storrow*, 5 Paige, N. Y., 285; *North British & Mer. Ins. Co. v. L. & L. & G. Ins. Co.* L. R. 5 Ch. D. 569).

But take the case of a tenant who has covenanted with the landlord to make good a fire loss; the landlord has been paid the loss by his underwriters, and they in turn sue the tenant under the doctrine of subrogation. Assuming that they can recover, may they recover in full, or has the tenant the right to say, we are both insurers and we must contribute pro rata? I do not recall any case in which this precise question has been decided by our courts. If the covenant of the tenant is in terms to repair or rebuild, it may not be easy to apply the principle of contribution, and it was not applied in the Darrell case in England. The two contracts are not of the same kind or class. One is to be performed usually by the payment of money, the other is to be performed by the rendition of certain work to a given result which is indivisible in its nature, and I am not able to cite any case which has enforced the principle of an equitable apportionment or contribution in such a situation. If, on the other hand, the tenant's covenant in terms calls for a payment in money for the amount of damage, it would seem as though the courts might regard both contracts as alike insurances against loss, or contracts of indemnity, and enforce the principle of equitable contribution as between them. (But see *Darrell v. Tibbetts*, L. R. 5 Q. B. D. 560.) Such a possible result, you will remember, is more than hinted at in the language of Mr. Justice Gray, which I have already quoted from the Grain Elevator case, and Chancellor Walworth suggests the same result in the Storrow case. He says:

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It is insisted, however, on the part of the respondents that although they have succeeded in satisfying the Superior Court that this was a loss for which the underwriters were liable on this policy, it was a case in which the underwriters and ship owners were equally liable and that the equities of both were equal as to the assured. Even if this were so, it does not follow that the assured had a right to receive the amount of the loss from either and assign over to the one from whom it was received the right to claim the full amount from the other party. It would rather present a case of equitable contribution in which each should contribute a moiety towards the loss, as in the case of a double insurance. (See also *Chi., etc., Ry. Co. v. Pullman Car Co.*, 139 U. S. 79, 88, in which the court puts all contracts of indemnity upon the same plane.)

XXXI

SUBROGATION

W. H. VAN BENSCHOTEN, Lawyer

Subrogation is the substitution of another person in the place of one creditor so that the person in whose favor it is exercised succeeds to the rights of the creditor in relation to the debt. More broadly, it is the substitution of one person in the place of another whether as creditor or as the possessor of any other rightful claim. The Court of Appeals of the State of New York has defined "subrogation" as the

"mode which equity adopts to compel the ultimate payment of a debt by one who in justice, equity and good conscience ought to pay it."

(Arnold v. Green, 116 N. Y. 566).

There are two kinds of subrogation, legal and conventional. Legal subrogation arises when by operation of law a third person becomes equitably entitled to stand in the place of the creditor. This kind of subrogation is sometimes known as the common law right of subrogation and it grows out of the doctrine of indemnity and also finds an equitable basis in the consideration that the person who caused the loss or who is primarily liable ought to be made ultimately responsible for the damages sustained. It is equitable and just that the burden of the loss ought ultimately to rest upon the party who caused it. (Conn. Mut. Life Ins. Co. v. Cornwell, 72 Hun., 199.)

It should be remembered, however, that legal subrogation is allowed only in cases where the person paying the debt—in the case of insurance, the loss—is under legal obligation or liability to do so. (Authorities cited in *Durante v. Eannaco*, 65 N. Y. App. Div. 435.)

The Supreme Court of the United States in the case of *Aetna Life Insurance Company v. Middleport*, 124 U. S., 534, approved the statement of one of the Chancellors of South Carolina made with reference to this question, and which was as follows:

"The doctrine of subrogation is a pure unmixed equity, having its foundation in the principles of natural justice, and from its very nature, never could have been intended for the relief of those who were in a condition in which they were at liberty to elect whether they would or would not be bound, and as far as I have been enabled to learn its history, it never has been so applied. If one with the perfect knowledge of the facts, will part with his money, or bind himself by his contract, in a sufficient consideration, any rule of law which would restore him his money or absolve him from his contract, would subvert the rules of

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such order. It has been directed in its application exclusively to the relief of those that were already bound, who could not but choose to abide the penalty * * * But I have seen no case, and none has been referred to in the argument in which a stranger, who was in a condition to make terms for himself, and demand any security he might require, has been protected by the principle."

The word "stranger" as used in this connection, is not necessarily one who has nothing to do with the transaction out of which the debt grew; any one being under no legal obligation or liability to pay the debt is a stranger, and if he pays the debt, a mere volunteer. (*Arnold v. Green*, 116 N. Y. 566; *Luppnier v. Garrels*, 20 Ill. App. 625.)

In passing we should perhaps say that payments made in ignorance of the real state of facts, have been held not to be voluntary (*Durante v. Eannaco*, 65 N. Y. A. D., 435) and a person who has paid a debt under a colorable obligation to do so that he might protect his own claim or under an honest belief that he is bound to, has been held entitled to be subrogated; (*Muir v. Berkshire*, 52 Ind. 149), and a person who mistakenly, but in good faith, believes that he has an interest in property, to protect which he discharges a lien is subrogated to the lien for his repayment. (*Fowler v. Parsons*, 143 Mass. 401; *Cockrun v. West*, 122 Ind. 372.) There are, of course, other instances of like nature. These exceptions are properly recognized by the Courts in order that so far as is possible equity may always be done.

The United States Supreme Court, in referring to legal subrogation, has said:

"In fire insurance, as in marine insurance, the insurer, upon paying to the assured the amount of a loss of the property insured, is doubtless subrogated in a corresponding amount to the assured's right of action against any other person responsible for the loss. But the right of the insurer against such other person does not rest upon any relation of contract or of privity between them. It arises out of the nature of the contract of insurance as a contract of indemnity, and is derived from the assured alone, and can be enforced in his right only. By the strict rules of the common law, it must be asserted in the name of the assured. In a court of equity or of admiralty, or, under some state codes, it may be asserted by the insurer in his own name; but in any form of remedy the insurer can take nothing by subrogation, but the rights of the assured, and if the assured has no right of action none passes to the insurer."

St. Louis, I. M. & S. Ry. Co. v. Commercial Union Ins. Co., 139 U. S. 223, 235.)

Conventional subrogation occurs when the creditor formally transfers his claim to a third person and arises from express or implied contract between the payer and the debtor or creditor that the payer shall be subrogated, rather than, as is the case in legal subrogation, from the automatic operation of a rule of law upon

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a given set of circumstances. Conventional subrogation or subrogation by act of parties may take place by the debtor's agreement that one paying a claim shall stand in the creditor's shoes, and, furthermore, can arise only by reason of an express or implied agreement between the payer and either the debtor or the creditor. (Conn. Mut. Life Ins. Co. v. Cornwell, 72 Hun., 199.)

The right of subrogation exists where the recovery is claimed solely by virtue of a statute imposing a liability just the same as though the loss was occasioned by the negligence or wrongdoing of another.

In the case of *Crissey & Fowler Lumber Co. v. Denver & R. G. R. Co.*, 68 Pac. Reporter, 670, (decided in the Court of Appeals of Colorado), an action was brought against the defendant railroad by the insurer under a statute of the State of Colorado providing as follows:

"Every railroad corporation operating its line of railroad or any part thereof shall be liable for all damages by fire that is set or caused by operating its line or any part thereof and such damages may be recovered by the party damaged by proper action in any court of competent jurisdiction."

The fire had by the Lumber Company, the insured, was caused by the railroad. It was claimed that the Insurance Company could not be subrogated to the owner's rights in an action where a recovery is claimed solely by virtue of the statute. The court, in holding that this contention was not sound, said:

"We do not understand counsel to challenge this right of subrogation where the loss was occasioned by the negligence or wrongdoing of another, and the common-law remedy is sought to be enforced. In such case we believe the right to be very generally, if not universally, recognized. 2 May, Ins. Sec. 454; 2 Bid. Ins. Sec. 1280 et seq.; Harris, Subr. Sec. 606; Sheldon, Subr. Secs. 11-230. It has also been held in many adjudicated cases that this right of subrogation exists whether the fire is caused by negligence or accidentally, within statutes imposing a liability in any event,—which directly covers the case at bar. See 2 Bid. Ins. Sec. 1281, and cases cited; *Hart v. Railroad Corp.*, 13 Metc. (Mass.) 100, 46 Am. Dec. 719 * * *. In all cases the right of subrogation is based upon the doctrine that the contract of insurance is treated as an indemnity, and the insurer, as a surety, is entitled to all the remedies and securities of the assured, and to stand in his place, or upon doctrines of a similar equitable character. 2 May, Ins. Sec. 454; Harris, Subr. Sec. 13 et seq. This being true, we see no reason why the right of subrogation should be denied in the one instance any more than the other, unless because of some prohibitory statute, or unless, perhaps, in the absence of any contract for subrogation, the facts might be such as to negative the existence of any equities in behalf of the insurer. None of such possible exceptions, however, apply to this case."

From these definitions it is evident that both legal and conventional subrogation may exist between the same parties at the

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same time. Sometimes where there is legal subrogation, there also exists, by reason of an express agreement between the parties, conventional subrogation, but frequently there exists conventional subrogation, when there is no right to legal subrogation. This is the case when a party being under no legal obligation or liability to pay the debt or loss, pays the same and is subrogated because of the provisions of an express agreement between the parties, and not because of the operation of a rule of law.

It has been held that the right of subrogation will not be allowed one who would thereby reap advantage in any way from his own wrongdoing, nor to relieve a party from the consequences of his own unlawful act, nor where it would be contrary to public policy, and that as its purpose is only to prevent fraud or subserve justice, it will not be applied where its exercise would promote injustice, and thus can be applied only with a due regard to the legal and equitable rights of others. (*German Bank v. United States*, 148 U. S., 573; *Rowley v. Towsley*, 53 Mich., 329; *Johnson v. Moore*, 33 Kan., 90; *Platt v. Brick*, 35 Hun., 121; *Drake v. Paige*, 52 Hun., 292).

It has also been held that the right of subrogation cannot be defeated because the policy might have been successfully contested by the insurer nor because the insurance company had not complied with statutory requirements: (*St. L. A. & P. R. Co. v. Fire Ass'n.*, 28 L. R. A. 83 (Ark.) 13; *Phenix Insurance Co. v. Penn Co.*, 134 Ind. 215); nor because the risk was negligently assumed by the insurer. (*U. S. Cas. Co. v. Eagley*, 55 L. R. A., 616 (Mich.), nor because the insurer is a member of a trust or combination in violation of statute. (*Freed v. Am. F. Ins. Co.*, 43 So. 947 (Miss.))

As subrogation, especially legal subrogation, is the application of equity, its enforcement depends to a considerable degree upon the facts and circumstances of each particular case, and on the principles of natural justice.

In *Drake v. Paige*, 52 Hun., 302, the Court said:

"The right of subrogation is an equitable one and its application must depend upon the circumstances of each particular case."

This proposition is probably somewhat limited where the right of subrogation arises under contract and is conventional subrogation.

Lines 102 to 105 of the Standard Fire Insurance Policy of New York, are as follows:

"If this Company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this Company

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shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this Company by the insured on receiving such payment."

It will be noted that this clause in the Standard policy is only applicable when the Company claims that the fire was caused by the act or neglect of some third party. In order for the insurer to have any benefit under this clause, there must be some third party responsible for the fire and who is liable to the insured for the damages suffered thereby. In such case, such party is primarily liable to the insured and it is the right of recovery which the insured has against such party under such circumstances that this clause of the Standard policy refers to.

If the policy did not contain this clause, the Company would still have the right of subrogation under the circumstances stated. It might not be able to require the assured to give the actual assignment as provided, and the provision that the assured shall make an assignment has been held to protect the insurer from having the assured destroy its right of subrogation, as will be hereafter referred to. (*Carstairs v. Mechanics &c. Ins. Co.*, 18 Fed. Rep. 473; *Jackson v. Boylston Mut. Ins. Co.*, 139 Mass. 508.)

It is well settled that before there can be any right of subrogation, the insured must be fully indemnified for the loss to his property; that is, the Insurance Company must have fully indemnified the insured, before it can claim the right to be subrogated either at common law or under the policy provision above referred to.

When the insured has been fully indemnified, subrogation passes all the insured's rights, privileges and remedies against the party primarily liable to the insurer. In other words, the insurer stands in the shoes of the insured. It can be subrogated to and have no greater rights than those which the insured had. If the latter had no rights, the insurer as subrogee can have none, and under the above provision, the insurer having received an assignment from the insured, would be entitled only to the rights, privileges and remedies which the insured had and could only recover the amount paid by the insurer to the insured.

Some of the more common instances where subrogation arises, which are of interest to insurers, are where goods are burned while being transported by a carrier, or where a mortgagee has taken out insurance to protect his mortgage, or where, through

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the negligence of a third party, the property of the insured has been burned, or where by the order of some governmental authority, property has been destroyed for the public good.

In the case of *Phoenix Insurance Co. v. Erie Transportation Company*, 117 U. S. 312, the plaintiff insured grain on a boat of the defendant, which vessel was afterward destroyed and the grain damaged. The plaintiff paid the insurance to the owners of the grain and then brought action against the defendant on the ground that it was subrogated to the rights of the owners of the grain against the defendant carrier. The bill of lading which the defendant transportation company gave to the insured (shipper), provided that the carrier should not be liable for loss or damage of the goods by fire, collision, etc., and further provided that the carrier when liable for the loss, should have the full benefit of any insurance that may have been effected on the goods.

The policy of insurance contained no express stipulation for the assignment to the insurer of the assured's right of action against third persons. In this respect the case differs from an action brought under the standard policy. The Court held that, while the loss had been incurred by reason of the negligence of the defendant carrier, the provision in the bill of lading which provided that if the carrier was liable for the loss, it should have the full benefit of any insurance that may have been effected on the goods, limited the right of subrogation and prevented the insurance company from recovering as against the carrier.

The Court, in discussing the nature of the right to be subrogated, said:

"That the right of the assured to recover damages against a third person is not incident to the property in the thing insured, but only a personal right of the assured, is clearly shown by the fact that the insurer acquires a beneficial interest in the right of action, in proportion to the sum paid by him, not only in the case of a total loss, but likewise in the case of a partial loss, and when no interest in the property is abandoned or accrues to him.

"The right of action against another person, the equitable interest in which passes to the insurer, being only that which the assured has, it follows that if the assured has no such right of action none passes to the insurer; and that if the assured's right of action is limited or restricted by lawful contract between him and the person sought to be made responsible for the loss, a suit by the insurer, in the right of the assured, is subject to like limitations or restrictions.

"For instance, if two ships, owned by the same person, come into collision by the fault of the master and crew of the one ship and to the injury of the other, an underwriter who has insured the injured ship, and received an abandonment from the owner, and paid him the amount of the insurance as and for a total loss, acquires thereby no right to

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recover against the other ship, because the assured, the owner of both ships, could not sue himself. *Simpson v. Thomson*, above cited; *Globe Ins. Co. v. Sherlock*, 25 Ohio, St. 50, 68.

"Upon the same principle, any lawful stipulation between the owner and the carrier of the goods, limiting the risks for which the carrier shall be answerable, or the time of making the claim, or the value to be recovered, applies to any suit brought in the right of the owner, for the benefit of his insurer, against the carrier; as, for instance, if the contract of carriage expressly exempts the carrier from liability for losses by fire; (*York Co. v. Central Railroad*, 3 Wall. 107); or requires claims against the carrier to be made within three months; (*Express Co. v. Caldwell*, 21 Wall. 264); or fixes the value for which the carrier shall be responsible; (*Hart v. Pennsylvania Railroad*, 112 U. S. 331). So the stipulation, not now in controversy, in the bills of lading in the present case, making the value of the goods at the place and time of shipment the measure of the carrier's liability, would control, although in the absence of such a stipulation the carrier would be liable for the value at the place of destination, as held in *Mobile & Montgomery Railway v. Jurey*, 111 S. E. 584."

The ruling of the Court would, undoubtedly, have been different in this case, had there been an express stipulation upon the subject in the policy, or had there been proof of fraudulent concealment or misrepresentation by the owner in obtaining the insurance.

Where there is no express stipulation upon the subject contained in the policy and no proof of fraudulent concealment or misrepresentation by the owner in securing the insurance, it is thus seen that the insurer's right to be subrogated may be defeated by an express contract between the owner and the carrier of the goods, that the carrier shall have the benefit of any insurance on them in case of loss. (*Phoenix Ins. Co. v. Erie, etc., Transportation Co.*, 117 U. S., 312; *Jackson Co. v. Boylston Mut. Ins. Co.*, 139 Mass., 508; *Platt v. Richmond, etc., R. Co.*, 108 N. Y., 358.) This might not be so if the insurance was taken out after a bill of lading containing such a provision had been accepted, and the insured took out the insurance with knowledge that the bill of lading contained such a provision, especially if the insured knew that the insurer had different rates of premium, one of which was applicable to a policy covering goods where the bill of lading did not contain such a provision, and the other a higher rate in case the goods were carried under a bill of lading containing such a provision; or if there was any misrepresentation or fraudulent concealment on the part of the owner and insurer as to the nature of his bill of lading in this respect, when procuring his insurance. (*Phoenix Ins. Co. v. Erie Transportation Co.*, 117 U. S., 312, and cases cited.)

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However, where the contract of insurance contains an express stipulation that the insurer shall be subrogated to the owner's rights against the carrier such as is contained in the standard policy, the owner cannot defeat the insurer's right of subrogation by contract with the carrier without forfeiting his own rights under the contract of insurance and losing his right to look to the insurer for a payment of his loss. (*Carstairs v. Mechanics', etc., Ins. Co.*, 18 Fed. Rep. 473; *Jackson Co. v. Boylston Mut. Ins. Co.*, 139 Mass. 508.)

In order that there may be no doubt whatsoever that the insured is bound to preserve the right of subrogation to the insurer, some policies contain a clause to the effect that any act or agreement by the assured tending to defeat subrogation shall void the insurance. It has been clearly and universally held by the Courts that if a policy contains such a clause and the owner contracts with the carrier that it shall have the benefit of any insurance on his goods in case of loss, that the owner violates his contract of insurance and cannot recover his loss against the insurer. *Fayerweather v. Phoenix Ins. Co.*, 118 N. Y. 324; *Inman v. So. Carolina R. Co.*, 129 U. S. 128.)

While, however, this might cause the assured to lose his insurance, the Supreme Court of the United States has held that he would still retain his right of action against the carrier (*Inman v. So. Carolina R. Co.*, 129 U. S. 128).

In a case in Minnesota where the shipper's insurance had become forfeited because he had violated the provision in the policy for subrogation by taking a bill of lading providing in case of loss any insurance should be for the benefit of the carrier, the insurer nevertheless voluntarily paid the loss to the insured, but upon express condition that they should have an unqualified right of resort over against the carrier, and the Court held that the carrier could not in defense avail itself of the clause in the bill of lading, inasmuch as the insured had invalidated the policy in accepting the bill of lading and hence there was no insurance existing upon which the clause in the bill of lading could operate. (*Southerd v. Minn., etc., R. Co.*, 60 Minn. 382.)

In the case of *Connecticut Fire Insurance Company v. Erie R. R. Co.*, 73 N. Y. 399, buildings which had been insured by the plaintiff were burned by fire caused by sparks or coals from an engine of the defendant. The plaintiff, under a policy of insur-

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ance issued by it, paid the loss and was held to be entitled to subrogation as against the defendant, it having been found that there was negligence on the part of the defendant in causing the fire.

In the case of *Excelsior Fire Insurance Co. v. Royal Insurance Co. of Liverpool*, 55 N. Y. 343, it was held that when a mortgagee or one in like position toward property, is insured thereon at his own expense, upon his own motion and for his sole benefit, and a loss by fire happens, that he is not required to exhaust his remedy upon the mortgage before enforcing the policy and that the insurer must pay, although the property undestroyed is equal in value to the amount of the mortgage debt, but that upon making such payment the insurer is entitled to an assignment of the rights of the insured, and under the principle of subrogation is entitled to all his rights and remedies which the mortgagee had against the property under his mortgage.

It has also been held in many jurisdictions, where the mortgagee has taken out insurance as above stated, that even in the absence of an express provision to that effect in the policy, the insurer, upon paying the mortgagee the amount of the loss, becomes subrogated pro tanto to the mortgage security as against the mortgagor, but not so as to in any way impair the right of the mortgagee to collect his debt in full. (*Ulster Co. Sav. Bk. v. Leake*, 73 N. Y., 161.)

In the case of *Pentz and others v. The Receivers of the Aetna Fire Insurance Company*, 3 Edwards Chancery Reports, 341, a loss arose from the destruction of certain stores and merchandise by gunpowder used by order of the Mayor and two aldermen of New York City to stop the ravages of fire. In consequence of the loss having been thus occasioned by the City authorities, the assured was entitled to recover from the City, which it did. The Aetna Fire Insurance Company, on account of the conflagration, which was the great fire in New York City, of 1835, became insolvent, and the assured made application to be allowed a dividend on account of his policy of insurance. The court denied the application, and in its opinion, said:

"I think it can hardly admit of a doubt that whatever sum the underwriters may be compelled to pay upon their contract of insurance for a loss occasioned in such a way as to render the city liable, the corporation are liable to reimburse to the insurer."

The court based its decision upon the proposition that if the assured were allowed to recover against the insurer the amount

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would have to be credited upon the amount due to the assured from the City so that the City could turn a like amount over to the insurer. To prevent such a circuitry, it denied the assured's application to be allowed to share in the dividend paid by the Receivers of the insurer.

An interesting case in the consideration of the subject of subrogation, is that of *United States v. The American Tobacco Co.*, 166 U. S., 468. The American Tobacco Company had been paid by its insurers for a large loss by fire. Among the items of total loss as adjusted with the Company were several thousand dollars worth of unused internal revenue stamps, the full value of which under the provisions of the United States Revised Statutes, were recoverable or redeemable by the Tobacco Company from the United States authorities. The insurers having paid the loss, claimed that they were subrogated to the rights and remedies of the insured for reimbursement from the Government under the terms of the Statute. An action was brought by the insurers in the name of the insured and a recovery had.

Under the provisions of the policy requiring the insured to make a formal assignment *pro tanto* of any rights or remedies that he may have against the party causing the fire, the Company may require an assignment as condition of payment, although such an assignment is not necessary to perfect the right of the company. (*Niagara Ins. Co. v. Fidelity Co.*, 123 Pa. St., 516; *Hamburg Bremen Fire Ins. Co. v. Atlantic Coast Line R. R. Co.*, 132 N. C., 75.) It, however, enables the insurance company without any question to institute an action in its own name against the party primarily liable. Sometimes the loss exceeds the amount of the insurance, and in such cases the insured and the insurer may properly make an agreement to sue the party primarily liable for joint benefit. (*Chicago R. R. Co. v. Pullman Car Co.*, 139 U. S., 79.) The party primarily liable, who is sued for causing the loss, cannot defend on the ground that the insurer has paid the amount due under the policy to the insured, since the policy is *res inter alios acta*.

In the absence of express stipulation the rule of subrogation will not be applied to prevent the insured from receiving his full indemnity. This perhaps is better expressed in this way:

Assuming that the insured, where the loss exceeded the amount of insurance, secured a judgment against the person primarily liable for the loss, to wit: a wrongdoer, for the full amount

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of the loss, but by reason of the insolvency of the party is only able to collect a part of the judgment. He could then, in the absence of a stipulation, take to himself an amount equal to the difference between the amount of insurance he had received and his actual loss and pay the balance over to the insurers, although, of course, he would in no instance pay over an amount exceeding the sum which the insurer had paid to him. (*Atch. etc., R. R. Co. v. Neet*, 7 Kan. App. 495.)

In the instance just cited had the rule of subrogation been fully applied and the insurer, under his right of subrogation, been entitled to recover from the wrongdoer an amount equal to the loss he had paid to the insured, the insured would not have been fully indemnified for his loss.

The Courts differ somewhat as to how far they will press the doctrine of indemnity and that of subrogation when applied to the law of insurance. The English courts, the United States Supreme Court and the courts of some of the states seem inclined to hold that the contract of insurance is one of strict indemnity and to be very liberal in construing the right of subrogation. The attitude of these courts is that a policy of fire insurance is a contract of indemnity and that upon paying the amount of the loss the insurer has the right to be put in the place of the assured, and if thereafter the assured receives compensation from other sources for the loss sustained by him, the insurer is entitled to recover from the assured any sum which he may have received in excess of the loss actually sustained by him. (*Darrell v. Tibbitts*, L. R. Q. B. Div. 560; *Castellain v. Preston*, L. R. 11 Q. B. Div. 380; *Phoenix Assur. Co. v. Spooner*, 2 K. B. 753; *Chicago, &c., R. Co. v. Pullman Car Co.*, 139 U. S. 79; *Weber v. M. & E. R. Co.*, 35 N. J. L. 400; *Packham v German F. Ins. Co.*, 91 Md. 515.)

In the case of *Castellain v. Preston*, supra, the insured made an executory contract to sell the premises insured under the policies, without mentioning anything about insurance. Before the contract was performed a loss by fire occurred and the insurance companies paid the loss to the vendor. Thereafter, as he was obligated to do under the English law, the vendee completed the purchase and paid the full purchase price to the vendor. Then the insurance company claimed the right to open its settlement with the insured and be paid back by him the whole amount of insurance paid. The lower court held that it could not, but on appeal the

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Appellate Court held that the company was entitled to recover under the doctrine of subrogation or upon the theory that the contract of fire insurance was one of strict indemnity.

The Court in giving the English construction of the right of subrogation said:

"Now it seems to me that in order to carry out the fundamental rule of insurance law, this doctrine of subrogation must be carried to the extent which I am now about to endeavor to express, namely, that as between the underwriter and the assured the underwriter is entitled to the advantage of every right of the assured, whether such right consists in contract, fulfilled or unfulfilled, or in remedy for tort capable of being insisted on or already insisted on, or in any other right, whether by way of condition or otherwise, legal or equitable, which can be, or has been exercised or has accrued, and whether such right could or could not be enforced by the insurer in the name of the assured by the exercise or acquiring of which right or condition the loss against which the assured is insured, can be, or has been diminished."

In the case of *Darrell v. Tibbitts*, *supra*, the landlord had insurance covering injury by explosion, and also had a lease with a tenant containing a covenant to make repairs. The property was damaged by an explosion. This covenant covered the making of the necessary repairs required because of this explosion and the damage was also covered by the insurance policy. The insurance company paid to the landlord £750, the amount of the loss. Thereafter the tenant made the repairs. The insurance company then brought an action against the landlord to recover back the £750, and obtained judgment for that amount. It should, perhaps, be noted that the explosion was caused by the negligence of a Gas Company, which paid the tenant damages. The Court in its opinion, said:

"The question now arises whether the insurance company who paid the money to the landlord at a time when they were obliged to pay by virtue of their contract, can recover it back because the tenants have done that which they could not avoid doing; if they had not repaired, they must have paid damages to the landlord. If the company cannot recover the money back, it follows that the landlord will have the whole extent of his loss as to the building made good by the tenants, and will also have the whole amount of that loss paid by the insurance company. If that is so, the whole doctrine of indemnity would be done away with; the landlord would be not merely indemnified, he would be paid twice over."

Also in this case, the court stated as follows:

"It was argued on behalf of the defendant that as regards the rights of insurers, a distinction exists between a case where the assured has a remedy against a tortfeasor in respect of the damage covered by the policy, and a case where the assured has a right by contract with some third person, to be indemnified in respect of that same loss. I am by no means prepared to say that there may not be some contracts so entirely independent of the subject-matter of the insurance, as to put the assured in the position of being more than indemnified in the event of a loss. But I am clearly of opinion as a matter of principle, that where the

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contract of insurance and the contract with the third party cover identically the same subject-matter, the assured has no right to more than an indemnity."

These cases and others which have followed them, seem to lay down the rule that the assured could never have but one reimbursement for his loss, that is, he could not be the gainer by reason of the loss, and if the assured was entitled to receive anything from any third person, which would in any way tend to diminish his loss or to compensate him for it, that the insurance company would be entitled either to be subrogated to his right to recover such compensation or to receive it from him directly or by credit on the amount of insurance, if he had already recovered it.

This must, of course, necessarily follow if a policy of insurance is to be held strictly and absolutely a contract of indemnity.

In some of the other states, however, including the State of New York, it has been held that this rule will not be enforced to such an extent and that where the assured has, under contract, a claim against a third party, who was not connected with the loss or responsible for it, that the insurer cannot, upon payment of the loss, be subrogated so as to recover from the third party. (*Michael v. Prussian Nat. Ins. Co.*, 171 N. Y. 25; *Foley v. Mfgs. F. Ins. Co.*, 152 N. Y. 131; *Continental Ins. Co. v. Aetna Ins. Co.*, 38 N. Y. 16; *International Trust Co. v. Boardman*, 149 Mass. 158; *Heller v. Royal Ins. Co.*, 177 Pa. State 262, 34 L. R. A. 600.)

This line of cases seems to follow the rule that a contract of insurance is not strictly a contract of indemnity and that it is only in instances where the loss sustained has been caused by the act or neglect of some third party, which makes such third party primarily liable, that the insurance company has the right of subrogation or is entitled to be credited with the amount received by the insured from such third party. They do not recognize the right of the underwriter to be subrogated to contract rights belonging to the insured against third parties, unless there is some express stipulation to that effect, except perhaps sometimes in the case of a mortgagee.

Richards in his work on Insurance, has referred to this question as follows: (3rd Ed., Sec. 54):

"For instance, the insured has two contracts both for value paid, both intended to protect from the same loss, or tending to accomplish that result, one of these contracts with an insurance company, the other with a third party. Why, under the doctrine of subrogation, should the loss fall upon the third party, while the insurance company, though re-

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taining its premiums, goes free? Why should the insurance company be subrogated to rights against the third party rather than the third party to the insurance?"

Many of the courts of this country, including those in the states last referred to, seem disposed to construe a contract of insurance upon property, if otherwise valid, as an absolute promise by the assurer, according to the terms of the policy, to pay the loss sustained, and it is urged that inasmuch as premiums are fixed upon that measure of liability it would be inequitable in principle to follow any other basis of indemnity. On the other hand, the English courts have felt that it might be against public policy to permit an insured to receive any more than just his indemnity under any circumstances.

In this connection, we should note the case of *Michael v. Prussian National Insurance Company*, 171 N. Y. 25. In that case the defendant issued a policy of insurance to the Buffalo Elevating Company on the use and occupancy of their property and elevator building with boiler and houses attached * * * in Buffalo, New York, and known as the Dakota Elevator. At the time the policy was issued the Buffalo Elevating Company was a member of an association under an agreement, which agreement was renewed after the policy was issued, by which during the season of navigation percentages earned went in a general fund created by pooling common earnings of the members of the association, and they were to be paid over under all conditions and notwithstanding that the elevator might be destroyed and the general fund diminished in consequence. In other words, by an agreement between the members of the association, the Buffalo Elevating Company was to receive its percentage of the profits, no matter if its elevator which was to be used under the pooling arrangement in earning the profits which constituted the general fund, was destroyed meanwhile by fire. The percentage which was to go to the Buffalo Elevating Company did not depend upon the remaining in existence of the elevator. The elevators were burned and destroyed, but not by reason of the act of the association or its members. The defendant insurance company claimed to be entitled by application of the equitable doctrines of subrogation to be credited with a proportionate share of the percentages or moneys received by the plaintiff from the association in reduction of its liability upon the policy. The Court held that this contention was untenable, Justice Gray in his opinion, saying:

"How the appellant (defendant insurance company) can be heard to claim the application of the doctrine of subrogation, it is difficult to per-

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ceive. It has, certainly, not paid the loss, and the loss was not one which was to be made good as such by the association. * * * The theory of the right of subrogation rests upon the fact that the assured has a claim against a third party for the loss which has been sustained in the destruction of the property insured. That is not the case with the plaintiff; who did not receive his payment from the "pooling" fund because, or in consideration, of the loss, but under an arrangement, which had secured to members of the association certain percentages, under all conditions, as a consideration of entering into it."

This case followed as an authority the well known case of *Foley v. Manufacturers Fire Insurance Company*, 152 N. Y. 131. In that case, certain houses were being constructed under a contract between certain contractors and the plaintiff, by which the contractors were to furnish materials and build the houses, and to complete them by a time specified for a fixed sum to be paid defendant ten days after their completion. The owner took out an insurance policy upon the buildings. The fire occurred before the completion of the buildings, and it was admitted that the contractors would remain bound by the contract, notwithstanding the destruction of the buildings by fire, and that the owners would not be bound to pay for the work done or material supplied up to the time of the fire.

The defendant insurance company contended that as the plaintiffs had not been put to any loss because they would not have to pay anything to the contractors until the buildings were completed, that it should be relieved on its policy. The Court, however, said:

The defendants neither can compel the plaintiffs to put the loss on the contractors, nor can they resort to the terms of the building contract to diminish the liability for an actual loss within the terms of the policy.

The fact that improvements on land may have cost the owner nothing or, if destroyed by fire, he may compel another person to replace them without expense to him, or that he may recoup his loss by resorting to a contract liability of a third person, in no way affects the liability of an insurer in the absence of any exemption in the policy.

The reasons for holding that an insurance policy is not a contract of strict indemnity, are set forth clearly and somewhat at length in the case of *King v. The State Mutual Fire Insurance Co.*, 61 Mass. (7 Cushing) 1. In that case a mortgagee at his own expense had insured his interest in the property mortgaged against loss by fire, without particularly describing the nature of his interest. A fire occurred and the mortgagee sued the insurance company. It was held that a mortgagee who gets insurance for himself, when the insurance is general upon the property, without limiting it in terms to his interest as mortgagee, but when in point of fact his own insurable interest is that of a mortgagee, in case of a

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loss by fire before the payment of the debt and discharge of the mortgage, has a right to recover the amount of the loss for his own use; and the Court in its opinion said:

But it is said, and in this certainly lies the strength of the argument, that it would be inequitable for the mortgagee first to recover a total loss from the underwriters, and afterwards to recover the full amount of his debt from the mortgagor, to his own use. It would be, as it is said, to receive a double satisfaction. This is plausible, and requires consideration; let us examine it. Is it a double satisfaction for the same thing, the same debt or duty?

The case supposed is this: A man makes a loan of money, and takes a bond and mortgage for security. Say the loan is for ten years. He gets insurance on his own interest, as mortgagee. At the expiration of seven years the buildings are burnt down; he claims and recovers a loss to the amount insured, being equal to the greater part of his debt. He afterwards receives the amount of his debt from the mortgagor, and discharges his mortgage. Has he received a double satisfaction for one and the same debt?

He surely may recover of the mortgagor, because he is his debtor, and on good consideration has contracted to pay. The money received from the underwriters was not a payment of his debt; there was no privity between the mortgagor and the underwriters; he had not contracted with them to pay it for him, on any contingency; he had paid them nothing for so doing. They did not pay because the mortgagor owed it; but because they had bound themselves, in the event which has happened, to pay a certain sum to the mortgagee.

But the mortgagee, when he claims of the underwriters, does not claim the same debt, he claims a sum of money due to him upon a distinct and independent contract, upon a consideration, paid by himself, that, upon a certain event, to-wit, the burning of a particular house, they will pay him a sum of money expressed. Taking the risk or remoteness of the contingency into consideration, (in other words, the computed chances of loss,) the premium paid and the sum to be received are intended to be, and in theory of law are, precisely equivalent. He then pays the whole consideration, for a contract made without fraud or imposition; the terms are equal, and precisely understood by both parties. It is in no sense the same debt. It is another and distinct debt, arising on a distinct contract, made with another party, upon a separate and distinct consideration paid by himself. The argument opposed to this view seems to assume that it would be inequitable, because the creditor seems to be getting a large sum for a very small one. This may be true of any insurance. A man gets \$1,000 insured for \$5, for one year, and the building is burnt within the year; he gets \$1,000 for \$5. This is because, by experience and computation, it is found that the chances are only one in two hundred that the house will be burnt in any one year, and the premium is equal to the chance of loss. But suppose—for in order to test a principle we may put a strong case—suppose the debt has been running twenty years, and the premium is at five percent, the creditor may pay a sum, equal to the whole debt, in premiums, and yet never receive a dollar of it from either of the other parties. Not from the underwriters, for the contingency has not happened, and there has been no loss by fire; nor from the debtor, because, not having authorized the insurance at his expense, he is not liable for the premiums paid.

What, then, is there inequitable, on the part of the mortgagee, towards either party, in holding both sums? They are both due upon valid contracts with him, made upon adequate considerations paid by himself. There is nothing inequitable to the debtor, for he pays no more than he originally received, in money loaned; nor to the underwriter, for he has only paid upon a risk voluntarily taken, for which he was paid by the mortgagee a full and satisfactory equivalent.

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This statement of the Massachusetts court was dicta, but, nevertheless is pertinent for the purpose for which it is cited, namely, merely to show the principle upon which that line of cases based their decision. It is interesting to note in this connection that in the case of *Kernochan v. The New York Bowery Fire Ins. Co.*, 17 N. Y. 428, Judge Roosevelt in his opinion, joining in an affirmation, after citing and quoting from this Massachusetts case, referred to the view as follows:

This view, however, it will be seen, ignores the principle of public policy that no man should be allowed to bargain for an advantage to arise from the destruction of life or property, in other words, to lay a wager that a particular person will die or a particular property be burnt within a given period. We regard the contract of insurance as one purely of indemnity. Should it be said that insurance companies will receive premiums without a corresponding risk, the answer is that such suggestion may be safely left to the interest of the parties, who will soon adjust their premiums to the diminished losses."

There is much to be said as to both of these views. On one side, it is the contention that public policy ought not to permit a party to be twice reimbursed for property destroyed by fire, and thus to be a gainer because of the destruction of property; on the other side is the strict legal enforcement of contract rights unaffected by this claim as to public policy.

Perhaps the best way to eliminate this question would be for the standard forms of policies to contain some clause which would cover the situation, so that both parties to the insurance contract would contract with the intention that there should be but one reimbursement.

Frequently questions connected with the right of subrogation arise between a mortgagor and his mortgagee and an insurer which has insured the property for both or for one of them. There are certain well established principles governing most of these questions, some of which are as follows:

When a mortgagee independently of the owner and mortgagor takes out insurance upon his own interest, and at his own expense, and for his sole benefit, the insurer upon payment of the loss to him is entitled to subrogation.

Excelsior Ins. Co. v. Royal Ins. Co., 55 N. Y. 543.

And this is also true under such circumstances when the mortgagee obtains the policy in form to the owner and mortgagor, but with loss payable to him (the mortgagee).

This right of subrogation does not depend upon the contract. *Thompson v. Montauk Ins. Co.*, 43 Hun., 218.

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In some states, for instance, Massachusetts, it was held the insurer could not have subrogation to the rights of a mortgagee as against the mortgagor, unless the policy in terms provided for it.

Suffolk Ins. Co. v. Boyden, 9 Allen, 123.

The Form of Policy now used in Massachusetts contains a provision which makes it possible for the insurer to take steps which will secure it the benefit of subrogation against the mortgagor.

If the insurer issues a policy to the owner with the loss merely made payable to the mortgagee, without a mortgagee clause, the latter is only an appointee to receive the loss (if any due) to the owner with whom the contract is exclusively made. (*Moore v. Hanover Ins. Co.*, 141 N. Y. 219), and there can be no subrogation on payment to the mortgagee.

Cohen v. Niagara Fire Ins. Co., 60 N. Y. 619.

When the policy insures the owner and mortgagor and provides that the loss be paid to the mortgagee, with mortgagee clause attached, and the insurance is void as to the owner, upon paying the loss to the mortgagee, the insurer is entitled to subrogation and as assignee of the mortgage, may foreclose it.

Springfield F. & M. Ins. Co. v. Allen, 43 N. Y. 389;

Hastings v. Westchester Ins. Co., 73 N. Y. 141.

Where the insurance is void as to the owner as against the mortgagee under the mortgagee clause, the insurance company cannot claim that the right of subrogation has been impaired or lost by a foreclosure and sale, and that, therefore, he cannot recover for the loss. If foreclosure proceedings are pending at the time of fire, the insurer should take active steps and protect its interest, if any, by paying the mortgage debt and taking an assignment or otherwise.

Eddy v. London Assur. Co., 143 N. Y. 311.

Until payment is made by the insurer, the mortgagee is free to make any settlement he wishes with other insurers, and if any insurer desires to avail itself of its right of subrogation under the terms of a mortgagee clause, and to acquire an interest in the mortgage so as to be able to dictate settlement with other insurers, it must first pay the amount due from it on account of the loss.

New Hampshire Ins. Co. v. National Life Ins. Co., 112 Fed. Rep. 199.

When the insurance is not sufficient to cover the mortgage debt, the insurer takes nothing by subrogation and assignment until the mortgage is paid or tendered in full, both as to principal and interest.

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Phoenix Ins. Co. v. First National Bank, 85 Va. 765;

Gibb v. Philadelphia Ins. Co., 59 Minn. 267.

If an insurer has, under a mortgagee clause, paid the mortgage in full and taken an assignment, upon foreclosure of the mortgage it need only credit upon the mortgage as against a previous owner liable for any deficiency, the portion of the loss for which it was originally liable to the owner at the time of the fire, under the apportionment clause of the policy.

Phoenix Ins. Co. v. Floyd, 19 Hun. 287; *affd. without opinion*, 83 N. Y. 613.

Questions relating to subrogation also sometimes arise in connection with the rights of a vendee or vendor.

If a vendee under an executory contract of sale agrees to pay the expense of insurance by the vendor, and does so, the insurance exists for his benefit, and the insurer has no right of subrogation to the claim of the vendor on payment of a loss to him.

Wood v. Northwestern Ins. Co., 46 N. Y. 421.

This, however, may be otherwise when, as between the vendor and vendee, the latter is not entitled to any benefit from the insurance.

Clinton v. Hope Ins. Co., 45 N. Y. 454.

When the vendee is discharged from liability to the vendor by occurrence of the fire, or when as between them, the vendee is entitled to the benefit of the insurance in event of loss, there can be no subrogation.

Clinton v. Hope Ins. Co., *supra*; See Lett v. Guardian Trust Co., 52 Hun. 570.

In the practical administration of insurance business as regards subrogation, perhaps one of the most important subjects to be considered is that of waiver, that is waiver of their respective rights by both the insured and the insurer.

The insurer's right of subrogation does not accrue until after loss has occurred. On payment of the loss the insured becomes a trustee for the insurer and cannot afterwards settle or compromise his claim against others liable for the loss to the insurer's prejudice.

If the insured settles with the party primarily liable and gives an absolute release of all his claims against such party without excepting the insurance, thus destroying the insurer's right of subrogation in case it should make payment of the loss, it is a good defense to an action brought by the assured against the insurer.

Dilling v. Draemel, 9 N. Y. Supp. 497; Sims v. Mutual F. Ins. Co., 101 Wis. 586; Highlands v. Cumberland Valley Farmers' Mutual Life Ins. Co., 203 Pa. 134.

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But if the release is not an absolute one and includes only such losses as are not covered by the insurance, it will not affect the assured's remedy against the insurer since the latter upon payment of the insurance will still retain its right of action against the party primarily liable.

Insurance Co. of N. A. v. Fidelity Title & T. Co., 123 Pa. 523.

If the assured gives a release to the party primarily liable in which it is expressly stipulated that it is not to affect the claim of the assured against the insurer for the loss covered by the insurance, thus making the settlement include only the loss not covered by insurance, it will not affect the insurer's right of action upon his policy.

Insurance Co. of N. A. v. Fidelity Title & T. Co., 123 Pa. 523.

If the third person is primarily liable only for a portion of the loss covered by the policy a release will operate to the benefit of the Insurance Company only to the extent to which the third person might have been held for loss for which the Company is also liable.

Svea Assurance Co. v. Packham, 92 Md. 464.

Where a mortgagee has by any agreement or act destroyed any right of the insurer to be subrogated to the rights of the mortgagee, he thereby releases the insurer from liability.

Lett v. Guardian Ins. Co., 52 Hun 570; *Aff'd.* 125 N. Y. 582.

If the assured receive damages from a party primarily liable before collecting his insurance, the amount so received would be applied pro tanto in discharge of the policy.

Conn. Fire Ins. Co. v. Erie Rwy. Co., 73 N. Y. 399.

If the assured collects damages from the party primarily liable after he has been paid in full for his loss by the insurer, he must account therefor to the insurer, or if after being paid in full by the party primarily liable, he conceals the fact and collects from the insurer, the insurer may recover back so much of the amount so paid as exceeds the assured's actual loss after deducting the amount received by him from the party primarily liable upon the ground that it was fraudulently obtained.

If the insurer voluntarily pays the loss with full knowledge that the assured has recovered his full loss from the party primarily liable, it cannot maintain an action against the assured to recover back.

Conn. Mut. Life Ins. Co. v. Erie Rwy. Co., 73 N. Y. 399.

If the party primarily liable pays the assured after payment by the insurer, with knowledge of that fact, it is a fraud upon the latter and will not protect such party from liability to the insurer

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Conn. Mut. Life Ins. Co. v. Erie Rwy. Co., 73 N. Y. 399; 19 Cyc. 895, and cases cited.

A decision of considerable interest is found in the case of Fire Association of Philadelphia v. Schellenger, 95 Atlantic Rep. 615 (N. J.) decided June 14th, 1915. In that case, the plaintiff issued a policy of insurance for \$3,000 on the property of the defendant. The policy contained the same provision as to subrogation as is found in the New York standard policy, and it is presumable that the policy was on such a form. The plaintiff paid to Schellenger, under its policy, \$2,855, the agreed amount of its liability. Subsequently, Schellenger brought an action against the Atlantic City Railway Company, claiming that the fire by which his property was injured, was caused by sparks negligently permitted to escape from an engine of that company. He recovered a verdict which was finally compromised at \$3,000 and paid by the Company, and a general release was given by Schellenger. Then the plaintiff brought an action against Schellenger, claiming that it had a right of subrogation to receive, out of the amount recovered by Schellenger against the railroad, reimbursement of the monies it had paid Schellenger under the policy. The Plaintiff Insurance Company made no claim for subrogation until it commenced its action against Schellenger, after Schellenger had recovered from the Railroad Company.

The Court of Errors and Appeals to which the case was appealed, held that the plaintiff could not recover on the ground that it failed to assert its claim to subrogation at or before the time when it made payment, under its policy, to Schellenger. The Court, in its opinion, said:

"It's failure to assert such claim at or before the time when the payment was made was a failure to comply with the condition upon which its right to subrogation depended, and terminated the existence of that right, leaving the defendant free to so deal with the person responsible for the fire, with relation to a settlement of any claim against such person, as he might see fit, without any liability to be called to account by the complainant for any of the proceeds of such settlement."

It is interesting to note that the Court held that if there had been no provision in the policy relating to subrogation, the plaintiff could have recovered under its common law right to be subrogated, but that having made a contract containing the provision which it did, and which provided that "This company shall on payment of the loss, be subrogated, etc.," and "Such right shall be assigned to this company by the insured on receiving such payment," its common law right of subrogation was waived, and therefore

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when it failed to comply with the provisions of the contract as to asserting its claim at the time of payment, it had no ground for recovery. Under this decision, the provision contained in the standard policy, to say the least, was not very advantageous to the Insurance Company. The importance of the decision, however, rests in the fact that it holds that the Company should, and, in fact, must assert its claim or right to be subrogated at or before the time it makes a payment to the insured under its policy. There is considerable doubt whether this decision will receive very general approval in the courts. If during the time that the insurance company delayed in claiming its right of subrogation, the position of any of the parties had been changed so that they might suffer by reason of the delay in claiming the right, it would be another question and perhaps then the company might be properly held to have lost its right to be subrogated.

I have called attention to some of the rules and principles of subrogation, and endeavored to show how they are sometimes applied under the law of fire insurance.

As was well stated by the Court in the case of *Eaton v. Hasty* (6 Neb. 419), in referring to subrogation: "No general rule can be laid down which will afford a test in all cases for its application, and whether the doctrine is applicable to any particular case depends upon the peculiar facts and circumstances of such case."

The nature and grounds of subrogation are clear. The difficulties arise in its application. The Courts are inclined, however, rather to extend than to restrict the principle.

XXXII

THE AGENT—AUTHORITY OF AGENTS AND OFFICERS OF COMPANY

FREDERICK T. CASE, Lawyer

The subject for discussion is "the agent—powers of agent and officers of the company."

You will have noticed in your experience with fire insurance problems that questions of agency pervade nearly every difficulty that comes up. The reason for this is the obvious one that practically all insurance throughout the world is done solely by and through agents.

We are not permitted tonight to range freely and at will over the whole subject of agency,—if we wished to cover the whole subject, a year's course of addresses would hardly be sufficient. We could spend some time on the interesting questions that arise where a man acts as agent for both the company and the assured, as in the case of the ordinary broker. We could discuss the statutory provisions relating to registration and taxation of agents, and so we could continue almost without limit. But your conservative and wise committee has limited me to that part of the subject which is suggested by two clauses in the New York Standard Form Fire Insurance Policy.

The first of those clauses (lines 47-48) provides that:

"In any matter relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of this company."⁽¹⁾

The second of those provisions (lines 113-116) says that:

"This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto, and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement, indorsed hereon and added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."⁽²⁾

- (1) Elliott on Insurance says in a Note at page 189: "This provision is found in the Standard policies of N. Y., N. J., Conn., R. I., La., Iowa, N. D., S. D., and N. C. The provision is not found in the Standard policies of Maine, N. H., Wisc., Mass., and Minn. The Mich. policy provides that: 'In any matter relating to the procuring of this insurance, no person, unless duly authorized in writing, shall be deemed the agent of this company.'"
- (2) Richards on Insurance (3rd Ed.) in a Note on page 206 says that this clause is found in nearly all of the Standard Form policies at the date of this writing (1907) except Maine, New Hampshire, Massachusetts, Iowa and South Dakota.

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A careful reading of the policy will show that these two sections are the only ones which touch directly and specifically upon agency. And while they seem fairly simple and at first sight unobjectionable, they raise fundamental questions that have come before the courts frequently and which have resulted, of necessity, in the court's practically wiping out those clauses from the policy. I do not know upon what authority or what advice of eminent counsel these clauses were inserted in the policy, but I have no hesitancy in saying that it was inevitable from the outset that they must fail to stand the test when brought before the courts.

But before plunging into the midst of our subject or jumping to our conclusions, let us look at one or two preliminary points that are most important. First of all what is an agent? You can find the word agent defined in any dictionary,³ and in any law encyclopedia,⁴ and then you can read thousands of legal decisions, each of which will give up pages on pages determining whether one particular person is or is not an agent. Without going through those decisions or definitions or any of them, we most of us will have a definite idea of who is an agent in the insurance business. We will usually picture him to ourselves as a local agent who solicits and accepts business, and who is entrusted with policy forms which he fills in, countersigns and issues to the applicants for insurance; or perhaps the word agent calls up to our mind the Special Agent, whom the company sends out with greater or less authority to appoint and supervise the local agents and their acceptance of risks; or again perhaps the word agent will suggest the adjuster whose most thoughtful action or most careful inaction is so often urged as a waiver or an estoppel.

In a legal or dictionary sense, however, the term is much broader. If we were to try to define the word agent, we would probably say that an agent is any person who acts under proper authority for another person. Such a definition is not complete nor quite accurate, but for our purposes it is probably sufficient to say that in the insurance sense an agent is any person who represents an insurance company with the latter's authority. It makes no difference what name or title such agent assumes or is given by the company, it makes no difference whether he be called local

(3) Century Dictionary "Agent—a person acting on behalf of another, called his principal; a representative; a deputy, factor, substitute, or attorney."

(4) 31 Cyc. 1189 "Agency in its broadest sense includes every relation in which one person acts for or represents another by his authority."

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agent, United States Manager,⁵ President, Secretary, adjuster, or even broker—if he represents the company and is authorized to do so he is the agent of the company, and the company is bound by his acts done within his authority. Thus we come back to one of our first propositions, namely, that agency pervades the whole insurance business from beginning to end. Practically all insurance business is done by corporations or associations and it is fundamental that they can act only through human agencies.⁶ A corporation is an artificial entity created by law, and it can act only through human hands. Thus every act of an insurance company must be done through an agent of higher or lower degree—in many instances the agent is the President or other high official of the company, while in other instances the agent may be the less exalted but also necessary counter man or even the reinsurance placer. One is an agent as much as another and each will bind his company by all that he does within the real or apparent scope of his employment.

The ordinary way of making a man an agent is by agreement between him and the company, whereby he is appointed to represent the company. Such an agency contract, like any other agreement, may be in writing or oral and may take any form that suits the parties.⁷ It will sometimes be a formal contract drawn by a lawyer, but more often it will be a mere exchange of letters or a mere understanding reached in the course of a conversation. There is no provision of law in any jurisdiction so far as I know which would require a contract of agency to be in writing. It has never been placed in the category of contracts for the sale of real estate, or contracts for the sale of merchandise worth more than \$50, and certain other contracts all of which are unenforceable unless evidenced by some written memorandum signed by the parties. In the case of the local insurance agent, the company usually but not always issues a written certificate of authority which the agent has framed and hung in his office. That certificate contains no lengthy statement of powers, nor does it contain any fine print conditions limiting the authority. It simply says that John Smith

(5) See *ADAMSON v. SCHREINER*, N. Y. Law Journal for December 9, 1915, page 914.

(6) Richards on Insurance, 3rd Ed., page 189; Morowetz on Corporations, 2nd Ed., Section 575, says: "Corporations almost invariably act through agents. There are few acts which a corporation aggregate can possibly perform without the intervention of an agency of some kind. It becomes necessary, therefore, in almost every instance in which the legal effect of a corporate act is in question, to consider the application of the doctrine of the law of agency."

(7) For instance, in a New Jersey case the relation of agency was held to be created merely by a nod of the head. *THOMAS v. SPENCER* (1899) Atl. 275

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of this town or that town is duly authorized to represent the company and write and issue its policies of insurance. There may be some understanding through special instructions or correspondence that the company has a prohibited list, or that it will limit its lines very strictly on certain named hazards. Such special instructions and understandings will be absolutely binding between the company and the agent, and any violation of the limitations of his authority will render the agent absolutely liable to the company for any resulting damages.⁸ But these special limitations cannot be held effective as against third parties who never heard of them.⁹ An easy example of this proposition is readily found in automobile insurance. The companies usually refuse to insure automobiles after they have arrived at a fixed and certain degree of antiquity. Antiques of all sorts are very difficult of valuation, and aged automobiles moreover might well be classed as extra hazardous—they seem peculiarly susceptible to fire on lonely roads where there are no unnecessary witnesses. But suppose an agent who has the strictest instructions on this point, violates the instructions, and insures a 1905 Atlas that is seriously affected in both lungs, and has a complication of internal troubles. The company may have a right of action against the agent for violating his instructions, but the policy would be absolutely binding upon the company unless it could be shown that the assured knew that the agent had no right to issue the policy on a car of that age. Proof of such knowledge on the part of the assured would generally be impossible. The point which I wish to make is that the agent under such general authority has wide and almost unlimited power to bind his company, excepting in the rare case where the assured could be shown to have knowledge of some limitation upon the agent's general powers.

Two other ways of creating the relation of agency are by estoppel and by ratification. If we were to speak more precisely we would say that estoppel and ratification do not create agency but merely create the same obligations and liabilities as if there had been a real agency. An example or two will show what I mean. Suppose John Smith of Syracuse had been your agent, but owing to the high cost of living and an expensive family he has gotten

(8) It was said in *LIGHTBODY v. NO. AM. INS. CO.*, 23 Wend. 18, "Although he (the agent) must answer to his principals for departing from their private instructions, he clearly bound them so far as third persons dealing with him in good faith are concerned."

(9) In *RUGGLES v. AM. CENT. INS. CO.* (1889) 114, N. Y. 415, an agent was authorized to write policies but was instructed not to bind any Special Risks—HELD: The agent could and did bind the company on plaintiff's special risk, the plaintiff having no knowledge of the restrictive instruction. See also *WALSH v. HARTFORD FIRE INS. CO.*, 59 N. Y. 171.

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so far behind with his balances that you terminate the agency. Ordinarily you do not advertise the fact in the local papers, and perhaps you do not take down his signs. Mr. Assured comes along and still sees your sign in the agent's office and so tells the agent to renew an expiring policy in your company. The agent agrees, and receives the premium, and perhaps even writes up the policy on some old form that he did not return to the company. Of course, I understand perfectly that the companies always try to avoid this sort of thing by taking up the supplies and by taking back their signs and certificates of authority. But I know also that the companies do not always fully succeed in this effort. In any such case it would be manifestly unfair to allow the company to sit back and say that man was not their agent when he wrote the policy. The company through design or neglect permitted him to hold himself out as its agent, and the assured relied upon his apparent authority. He was not the agent of the company in writing that policy, but the company will be bound by his acts because he was permitted to act as though he were duly authorized in that regard. Such is an example of what we know as agency by estoppel.

Now suppose this discharged agent sends in to the company a line that is quite attractive and the company in its eagerness for business accepts the line and the premium that goes with it. In that case the agent has no authority to accept the business, but the company by confirming his action and receiving the premium thereby ratifies his act and becomes bound by it. Still he was not the agent of the company, but the company becomes obligated by its ratification to the same extent and in the same manner as if he had been acting under an original authority.

However the agency may arise, whether by direct understanding between the company and agent, or by estoppel, or by ratification, the result is the same, namely: that the company is bound by the acts of the agent that are done within the scope of his authority or within its apparent scope. Thus it becomes evident that the companies are to a very remarkable degree at the mercy of their local agents, and their adjusters and their other representatives. The local agent may say to the assured "your chattel mortgages, or your barrels of gasoline will not make any difference with your insurance." The adjuster can readily say "never mind about a proof of loss, I see what you have and I will tell the company's loss department all about it." It was undoubtedly for the purpose of avoid-

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ing the innumerable difficulties in which the agents may involve the companies, that the framers of the New York Standard Form Policy inserted the two clauses as to agency. They were not new ideas but were found in similar, if not identical, form in other policies that were then in use.

The first of these clauses was that "in any matter relating to this insurance no person unless duly authorized in writing shall be deemed an agent of this company." It is hard for us to see exactly what the framers of the policy had in mind when they used that clause. They must have known perfectly well that there are constantly a great number of agents of the insurance companies who have no written authority. Recently I had occasion to sue a local agent for over-due balance. When I came to prove the agency in court I found that by a peculiar chance no written commission had ever been issued to him. He had been acting as agent for the company, and had done a large volume of business for them for something like eight years or more. Unquestionably he had been the company's agent, and he had issued and signed thousands of policies containing this clause that no one should be deemed an agent for the company unless authorized in writing. And manifestly it would be grossly unfair and impossible for the company to deny liability on any of those policies on the ground that the agent who wrote them had no written certificate of authority.¹⁰ If this clause were held to be strictly binding as between the insured and the company, we could deny liability under every policy written by that agent, simply and solely because he never received a written authorization to represent the company. If that clause could be invoked literally, the companies might do well to appoint every agent orally and then they could recognize his authority in all honest and unobjectionable losses, and deny his authority in the fraudulent cases.¹¹

This clause and similar clauses have come before the courts on numerous occasions and it has been held always that a man is or is not an agent without regard to any clause or provisions stated

(10) See *McELROY v. BRITISH AMERICAN ASSN. CO.* (1899) 94 Fed. 990.

(11) Elliott on Insurance at page 199 says: "Any other rule would permit an insurance company to relieve itself from all responsibility for the mistakes or misconduct of its agents, by the simple device of sending them out without written authorization."

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in the contract.¹² Thus if you have had a Mr. Smith as your local agent in Syracuse for the past ten years, you cannot unmake or disaffirm such agency merely by a clause in the policies which he writes as your agent. If it is true that Mr. Smith is your agent, it does not become untrue merely by the insertion of a clause to the contrary in the policies. This same idea is expressed by one high authority on insurance law where he says in effect that these provisions in the policies are binding if not untrue¹³—undoubtedly he would agree that if the clause is untrue then it is not of any effect.

This provision was probably put into the policy primarily to save the companies from liabilities for acts and statements of the brokers. Many of us have had occasion to learn why so many property owners regard the broker as the agent for the company. First of all he is paid by the company. The rate of premium is fixed by the companies, and the assured pays only that premium without giving any compensation to the broker for his work. The assured very likely does not know whether the broker is a salaried man, or on commission, or on both salary and commission. But he does know that the broker looks solely to the company for his pay.

Then too the broker delivers the policy and collects the premium. He comes into the assured's place of business, solicits the business, and having obtained the line he says to the assured, "consider yourself insured from this moment,—I will bring the policy as soon as I can have it written up." A few days later he brings around the policy and collects the premium. If the broker had been a salaried solicitor of the insurance company, his actions and his statements would not have been different. Moreover, the company usually has a running account with the broker, giving him sixty or ninety days credit for payment of premiums, charging his account with return premiums. They have a regular course of business whereby the policy is handed to the broker for delivery to the assured, and the broker is expected to collect the premium from the assured and then within the sixty or ninety days he is supposed to remit to the company, less commissions and subject to other proper credits and allowances that may have accrued.

(12) May on Insurance (4th Ed.) Section 144 G, at page 286 says: "It makes no difference that the policy declares the agent to be the agent of the assured, not of the company. For whom a person is acting is a matter of law on the facts of every case. The application precedes the policy, and to hold that a provision in the aftercoming policy unknown to the assured at the time of application could turn the insurance agent into his agent, when he thought all the time he was dealing with him and accepting his advice as agent of the company, would be an outrage."

(13) Richards on Insurance (3rd Ed.) page 193.

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When these facts have been called to the attention of the courts they have held that under such a course of dealing the broker is the agent of the company at least for the purpose of delivering the policy and collecting the premium—and this has been held regardless of the policy provisions that no one is to be deemed an agent of the company unless duly authorized in writing.

Thus in one case that has come to my attention the company sued the assured for the premiums upon his policies and he defended on the ground that he had already paid the premiums to the broker. To this the company replied that they were not bound by his payment to the broker because the broker was not an agent for the company. But the court held that as the business was done the broker was the agent for the company, at least for the purpose of delivering the policy and collecting the premium. He held no authority in writing from the company but he was held to be the company's agent in spite of the policy provision which we are now considering.¹⁴

In another case the insurance company had endeavored to cancel a policy for non-payment of the premium. A little later a fire occurred. When the assured sued on the policy the company defended on the ground that the policy had been cancelled for non-payment of premiums. The assured replied that there had been no effective cancellation because there had been no return of the unearned premium. She showed that she had paid the premium to the broker and that the cancellation notice was not accompanied by any tender of the return premium. The Court held in this case as in the other one, that the broker was the agent for the company for the purpose of collecting the premium so that a payment to him was in effect a payment to the company, and that consequently there could be no cancellation without a return of the unearned premium. This was so determined in spite of the fact that the broker held no written authorization from the company and in spite of the fact that the policy contained the clause that no one should be deemed an agent of the company unless authorized in writing.¹⁵

The ground of decision in these cases is usually the simple one that you cannot alter an established fact merely by a clause in the policy. And that is the correct ground, for if you have by word or

(14) *GLOBE & RUTGERS FIRE INS. CO. v. ROBBINS & MYERS* (1904) 43 Misc. 65; Affirmed on appeal, 109 App. Div. 530.

(15) *BINI v. SMITH* (1899) 36 App. Div. 468.

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act authorized a man to represent you as your agent you cannot effectively deny that fact even by a clause in the statutory form or insurance policy. But at least one decision falls back upon that frequent refuge of the weakminded—*waiver*. Where a court cannot think of any other ground of holding in favor of an assured and against a company, they say that the company has in some way waived its defense. Most any act or omission to act can be a waiver. If a company receives and retains an unsworn and unsigned inventory of a man's loss it may be held to have waived the service of formal sworn and detailed proof of loss.¹⁶ If a company puts into a policy the ordinary 80 percent coinsurance clause, it has thereby waived the prohibition against other insurance.¹⁷ And so at least one court held that this provision of the policy that no one be deemed the agent of the company unless authorized in writing could be and was waived by the company whenever the company appointed an agent in any other manner than by written authorization.

This doctrine of waiver has been extended and developed without much limit in recent years as was doubtless pointed out in the recent address before you upon that subject. But waivers must have been well known to the framers of the policy and they tried to clear up the difficulty by inserting the second clause that I have quoted already and which provides that all waivers must be in writing endorsed on the policy. But unfortunately the courts have held that this provision, like all others, can be waived, and that it can be waived orally or merely by actions without spoken words.¹⁸ In fact the law may be stated broadly that an insurance company, or an individual for that matter, cannot by any conceivable form of condition or proviso give up or yield the right to waive any condition of the contract.¹⁹ And this must be true. It would be intolerable if the law were to say that a contract once made could not be voluntarily modified by consent of both parties.

(16) See *GLAZER v. HOME INS. CO.* (1912) 190 N. Y. 6.

(17) *POOL v. MILWAUKEE MECHANICS* (1895) 91 Wis. 530; *NESTLER v. GERMANIA FIRE* (1904) 44 Misc. (N. Y.) 97, affirmed 91 N. Y. Supp. 29. In the latter case it is said that the use of the 80% co-insurance clause permits other insurance only to the extent of the 80% therein mentioned. This limitation on the extent of the waiver does not seem to us proper. We believe that the only possible position both legally and practically is either that the prohibition against other insurance is wholly waived or else that it is not waived at all.

(18) A few very recent cases in point are: *NICHOLS v. PRUDENTIAL*, 170 Md. App. 437; *BANK OF ANDERSON v. HOME INS. CO.* (Cal. App. 1918) 111 Pac. 507; *SOUTHERN STATES FIRE INS. CO. v. VANN* (1915 Fla.) 68 So. 647; *HOME INS. CO. v. WILSON* (1915 Ark.) 176 S. W. 688; *L. L. & G. v. GARGILL* (1915 Ark.) 145 Pac. 1134.

(19) MacGillivray on Insurance page 916.

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Suppose you rent an apartment and in the lease you provide that your landlord must do certain painting. Then you find that the paint is not so necessary as you thought so you tell the landlord to forget it, never mind it, that you waive the provision as to painting. You would be indeed surprised and shocked at any rule of law which would step in and say you cannot waive your contract provision, and having contracted for painting you must submit to it even although both you and the landlord would prefer to modify the contract in this particular.

Now what is sensible as to one condition is equally sensible as to another. If a company can waive a gasoline forfeiture, it can equally well waive the provision that changes in the contract must be in writing endorsed on the policy. There are a great quantity of court decisions upon this point, and they are found in nearly every state in the Union. They all seem to be agreed upon the point of law that the company through its duly authorized agents may waive this clause just as easily and surely as they can waive other clauses of the policy. Mr. George Richards in his well known and excellent work on insurance, takes up many pages in what might well be treated as a brief for the insurance companies in support of a strict construction of this clause of the policy. He urges that it is perfectly proper for the companies to provide the manner of making waivers, namely, by written endorsements on the policies, and he feels that the courts should give strict effect to such a clause. In one decision cited by Mr. Richards it is stated that the decisions are in hopeless conflict, some deciding that waivers must be in writing and others deciding exactly the other way. And then again it is said that some decisions make a distinction between those cases where the alleged forfeiture to be waived had occurred before the issuance of the policy and those in which it occurred afterwards.²⁰

Personally, I cannot see any conflict between the cases in so far as they lay down any legal doctrine. They all agree that this clause as to the mode of making waivers may itself be waived by any person who has sufficient authority for that purpose. With that point of law in mind they examine the particular facts in each case and then come to a conclusion as to whether the particular agent in question had sufficient authority to make the waiver. Dif-

(20) Richards on Insurance (3rd Ed.) page 195 et seq. and cases cited therein.

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ferent agents will have different degrees of authority and that is what gives rise to the apparent differences in the conclusions of the courts.

Moreover this easy way of getting rid of requirements that waivers be in writing is not confined to fire insurance policies. The same rule is seen in written leases. Every one of you who has a lease on office or home will probably find a fine print condition saying that you cannot sublet without the written consent of the landlord. In spite of this express provision of the lease an oral consent over the telephone is sufficient to permit a subletting. If the landlord gives his consent orally it will be deemed that he has waived the requirements that the permission be in writing.²¹

To hold any differently would be to make the written contract an instrument of oppression. An example of the way this thing works out came to my attention last winter. A retail clothing merchant in Passaic had a fire which looked rather suspicious. Upon investigation I found that the building where his store was located had been condemned by the Board of Health and was being reconstructed and rebuilt piecemeal. Half of the building had been torn down and partly rebuilt when the fire came. The local agent who wrote the policy passed the place of business several times each day and knew well all about the work, but he never endorsed any permit on the policy and he did not make any effort to cancel the policy. About a week before the fire the regular inspector of the company looked over the place and reported back to the company that assured was shortly to move to new store and advising that the risk be continued uncanceled so as to hold the line after the removal to a better building. I think you will all agree with me that it would have been a gross injustice for any company or any court to say that the insurance was forfeited under those circumstances simply because the company and the assured both thought it unnecessary to endorse the policy with written waivers and consents to the rebuilding operations.

Similarly where the assured goes to the local agent who issued the policy and tells him that the premises are vacant and unoccupied and the agent assures him that the insurance is still in force and that the company takes no notice of the clause against vacancy. It would not be fair dealing to hold that the policyholder who had relied upon such assurance of the regular agent of the

(21) WEISBROD v. DEMBOWSKY, 25 Misc. (N. Y.) 485.

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company should lose his insurance merely because he and the agent had not thought it necessary to reduce the understanding to writing and attach it to the policy.

And so we could go through case after case where the insurance company through its proper representative has by act or words waived conditions without endorsing such waiver on the policy. Wherever that occurs it would be grossly unjust and highly improper to allow the company to hide behind the fact that the waiver was not in writing on the policies. I feel no hesitancy in saying to you that the courts and juries are going to do justice in such cases and are going to refuse to give effect to the strict terms of the condition requiring waivers to be in writing. They may base the decisions on some doctrine of waiver or maybe they will call the legal theory by the name of estoppel, or perhaps they will find some new legal phraseology to fit it. Under whatever name it goes the doctrine will amount to this: that where a man has in fact and in truth been appointed an agent without written authorization, the courts will hold that he is such agent in spite of any policy provision to the contrary; and further, wherever the company has in fact and in truth waived a defense the court will so hold in spite of any policy provisions to the contrary. There will still be a question of fact to decide in each case—it will still be necessary to decide whether the company's representative did actually make the waiver, and whether he was clothed with sufficient authority to make such a waiver. Such question of fact must depend upon all the surrounding circumstances and each case will be peculiar to itself. And in determining such questions of fact and weighing the evidence we must remember that as the business is done, the ordinary local agent and other representatives of the companies are allowed the widest powers in practice and as a matter of fact are constantly giving unwritten waivers which the companies sanction or wink at without objection.²²

What then is our conclusion as to these two agency provisions in the New York Standard Form Fire Insurance Policy? It simply amounts to this, that you cannot change an unalterable fact

(22) Richards on Insurance (3rd Ed.) page 205, says: "The regular local or commissioned agents of fire insurance companies are said to be general agents, and except as restrictions upon their authority are inserted in the application or policy, or otherwise made known to the insured, they are held to have power to waive conditions and forfeitures, and to estop the company, without written permit. This conclusion is based largely upon the extent of their actual authority, which embraces such acts as accepting or rejecting proposals, countersigning, delivering, canceling, renewing policies, giving written permits, and fixing rates of premiums."

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by a clause or condition put into a written instrument.²³ If the sky is blue you cannot change its color by saying in a contract that it shall not be deemed to be blue. And likewise if you put out a local agent with full authority to issue policies and agree upon the terms of the insurance you cannot alter the fact that you have given him such full powers merely by denying it in the policies which he writes. As Mr. George Richards says in his book, these clauses are not illegal and are all right if not untrue. He might well have added that where they are untrue they are of no effect. In thus practically nullifying these clauses of the policy the courts and juries have not applied any new doctrines of law nor have they discriminated against the insurance companies. They have applied the same rules that are applied to other contracts and have determined the facts in the light of the evidence produced before them.

(23) *STERNAMAN v. MET. LIFE INS. CO.* (1902) 170 N. Y. 12, involved the clause in a Life Insurance policy providing that the examining physician should be deemed the agent of the assured. In holding that the physician was in fact the agent of the company in spite of that clause, VANN, J. said at page 19: "The power to contract is not unlimited while as a general rule there is the utmost freedom of action in this regard, some restrictions are placed upon the right by legislation, by public policy and by the nature of things. Parties cannot make a contract in violation of law or of public policy. They cannot by agreement change the laws of nature, or of logic, or create relations physical, legal, or moral, which cannot be created. In other words, they cannot accomplish the impossible by contract."

XXXIII

WAIVER AND ESTOPPEL

W. J. NICHOLS

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One cannot go far in any walk of mercantile life without learning of the principle of law that oral testimony is inadmissible to contradict the terms of a written contract. This is referred to by the authorities as "The Parol Evidence Rule," "parol evidence," as thus used, meaning evidence based on oral testimony.

The reason for this rule needs no defense; its justification is obvious. Witnesses may die, witnesses may lie, memories may fail; but, in the absence of fraud and mutual mistake of facts the written contract, if in existence when its provisions are to be construed or enforced, is the best and properly the only evidence of the meeting of the minds of the parties thereto.

In the opinion of so competent a tribunal as the United States Supreme Court, this rule should apply to written contracts of insurance just as it applies to other written contracts.

We are told that at one time in the history of insurance its contracts had the protection of this rule; but today it is often difficult, until the matter has been threshed out by the courts, to determine the respective rights of the parties to an insurance contract.

The interpretation of the language contained in the policy may be a perfectly simple matter. To predict the evidence that will be adduced to contradict its terms, or how far it will be accepted by a jury, is a hazardous undertaking.

There is, as we all know, one sure way to determine whether a given specimen is a mushroom or a toadstool, that is, to eat it. If one lives, it is a mushroom; if one die, it is a toadstool. The happy characteristic of this problem is that one may, if he chooses, leave it unsolved.

But the uncertainties of an insurance contract under which a loss is claimed must be solved somehow. Except so far as they arise from the use of ambiguous language in the contract itself, these uncertainties are due to the application to the insurance contract of the doctrine of waiver and estoppel, and it is this doctrine that we are now to consider.

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We read sometimes of the doctrine of waiver, sometimes of the doctrine of estoppel; but almost always we find the two nouns coupled together, the reference being to the "Doctrine of Waiver and Estoppel."

A layman may be able to say as to some cases that they involved the doctrine of Waiver; and in others that they involved that of Estoppel. But he will find many cases where he is unable to say whether they turned on the one or the other. It seems unnecessary for our present purposes to go into these fine distinctions, and we shall make better progress if we consider them together under the head, "The Doctrine of Waiver and Estoppel."

Webster's New International Dictionary defines "estoppel" as follows:

"Law. A preclusion or bar to one's alleging or denying a fact because of his own previous action, allegation, or denial by which the contrary has been admitted, implied, or determined. Estoppels are divided into three classes:

"Estoppel by record, sometimes called 'estoppel by judgment,' which precludes the denial of the truth of anything appearing in the record of a final judgment, so that if the judgment is in rem it is conclusive against the whole world, and if in personam, upon the parties and their privies only.

"Estoppel by deed, which precludes a party who has entered into an agreement by deed, or instrument under seal, from denying, to the prejudice of the other party, anything stated therein.

"Estoppel in pais, or estoppel by conduct, which, when a party, whose conduct or language has caused another reasonably to believe in the existence of a certain state of things and (having a legal right so to do) to act upon the belief, precludes him from averring or setting up to the prejudice of the latter that a different state of things existed at the time in question. An intent to defraud or deceive is not essential to cause the estoppel. Estoppels by record and by deed are often called 'commonlaw, legal, or technical estoppels,' as distinguished from the estoppel in pais, which is often called 'equitable estoppel,' because it arose in courts of equity, though it is now applied by all courts."

The same authority gives this definition for "waiver":

"Law. Act of waiving something; act of waiving, or intentionally relinquishing or abandoning some known right, claim, or privilege. Cf. Acquiescence."

In a recent British work on Insurance Law, the author, Mr. MacGillivray, in beginning his remarks on the subject of "waiver," quotes what he presumably considers the best judicial definition of this doctrine as applied to the insurance contract. This he finds in the decision of the Supreme Judicial Court of Maine, in *re Hanscom v. Insurance Companies*, 90 Maine, 333. The court said (see Volume 27, Insurance Law Journal, page 23):

"A waiver involves the idea of assent, and assent is primarily an act of the understanding. It pre-supposes that the person to be affected has knowledge of his rights, but does not wish to enforce them: Jewell vs.

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Jewell, 84 Me., 304. It is an 'intentional relinquishment of a known right' (Robinson vs. Insurance Co. (Me.) 38 Atl., 320), and is a question of fact whenever it is to be inferred from evidence adduced, or is to be established from the weight of evidence (Williams vs. Association, 89 Me., 158; Nickerson vs. Nickerson, 80 Me., 100). Again, it may happen that a waiver of a breach of the condition in the policy was not actually intended; but if the conduct and declarations of the insurer are of such a character as to justify the belief that a waiver was intended, and acting upon this belief the insured is induced to incur trouble and expense, and is subjected to delay to his injury and prejudice, the insurer may be prohibited from claiming a forfeiture for such a breach, upon the principles of equitable estoppel: Wood, Inc., 176, 832, 837, and cases cited: May, Ins., 503; Peabody vs. Association, 89 Me., 96."

It requires little effort to conceive that an insurance company that has voluntarily relinquished a known right under the policy, is, by reason of that relinquishment, estopped from asserting that right. This view enables us to consider the whole subject as one of estoppel, and so, with your permission, we shall regard it.

Whenever, in this paper, the writer refers to "the Company," the insurer (Insurance Company) is meant.

Nobody with whom I have any acquaintance professes to know the exact course of the line between danger of and safety from this source. The framers of the New York Standard policy, with which we are so familiar, probably thought that they had successfully eliminated therefrom every element of this sort of danger, when, at the end of the policy, they inserted this clause:

"This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be endorsed hereon or added hereto, and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

This I may refer to as the General Anti-Waiver clause.

Had this clause achieved its manifest object, a large part of this paper would have been spared—you in the hearing, and me in its preparation. Unfortunately, the hopes of the framers of the policy were but partially realized. This may have been largely because they attempted too much. The courts seem very generally to have taken the view that somewhere must reside the authority to conduct orally, on the part of the company negotiations with the assured relative to waiver; so that in attempting to restrict even the officers of the company to waiver in writing, the framers of

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the New York Standard Policy have, by some courts, been held to have made the clause impossible of application as intended. Had the restriction applied to agents only, the clause might have been construed, as to them, according to the intent of the framers.

It must not be understood that the doctrine of waiver and estoppel applies always in favor of the insured and against the Company. In some circumstances it applies against the insured and in favor of the insurer. But such cases are so infrequent that when the doctrine is referred to it is almost always as favoring the insured.

All but a negligible percentage of the losses reported are adjusted with no thought on either side of the necessity of precaution to prevent the diminution, by waiver or estoppel, of rights under the policy. It is the exceptional case only that calls for caution in this respect on either side. However, such a case is sure to occur sooner or later in the experience of anyone actively engaged in the business of loss adjustments.

When he has such to deal with, the adjuster needs to act with circumspection, not undertaking to ascertain the exact location of the brink of the precipice (this, by reason of darkness or fog, or perhaps defective vision, is uncertain), but endeavoring to keep conservatively within the zone of safety.

The thought permeating this paper can be summarized briefly as "Safety First."

It is not to be expected that you will receive a chart of the rocks and shoals that will serve you in all jurisdictions. We shall do well if we learn how we may be reasonably safe in operating under the New York Standard Policy or policies similar thereto.

As calling for careful consideration of our subject, we may assume that we are dealing with those cases where wilful burning by or at the instance of the insured is as certainly the cause of loss as it can be without being demonstrable to the satisfaction of the jury in a criminal trial.

A policy of insurance may be considered with reference to three distinct periods. The first includes the negotiations for the policy and terminates with the completion of the contract, usually with the delivery of the policy. The second period begins at the termination of the first and itself terminates with the happening of

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the loss. The third period begins with the happening of the loss and terminates when insured and insurer have settled all questions at issue between them.

Let us now consider the first period outlined above.

There is an overwhelming preponderance of opinion manifested by the courts of the various States to the effect that the Company is estopped from asserting, in defense of a claim under its policy, any fact of which it had knowledge at the inception of the contract. This preponderance of opinion is based chiefly on one argument, viz: that it would be unjust to the insured to deny him indemnity for a loss because of facts, existing at the inception of the policy, of which the Company had knowledge at the time. This argument is put in different ways; as, for instance, that it would be a fraud on the insured for the Company to accept the premium with knowledge that there could be no recovery under the policy in event of loss; or that by issuing its policy with knowledge of a certain fact, the Company must be deemed to have waived any defense based thereon. But, however stated, the argument is, in theory, persuasive. In practice it probably promotes many fold more injustice than it prevents. This is due to the ease with which the average jury will believe the statement of the insured that, in applying for the policy, he notified the agent of the fact, even though his testimony be uncorroborated, and flatly contradicted by the testimony of the Company's agent.

So far as relates to matters prior to the inception of the policy, a decided majority of the State Courts have declined to relax their application of the doctrine of estoppel, continuing to apply it whenever a jury has found, as a matter of fact, that the agent of the Company, during the negotiations for the policy, was told by or in behalf of the insured of the fact set up by the Company as a defense to the insured's claim.

That their arguments are not impregnable appears from a study of the opinion of the United States Supreme Court in deciding, in favor of the Company, the celebrated case of *Northern Assurance Company v. Grand View Building Association* (183 U. S. 308; 31 Insurance Law Journal 97). This opinion is too long for quotation here in full but we may well take time for the following excerpt therefrom:

"What, then, are the principles sustained by the authorities, and applicable to the case in hand?"

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"They may be briefly stated thus: That contracts in writing, if in unambiguous terms, must be permitted to speak for themselves, and cannot by the courts, at the instance of one of the parties, be altered or contradicted by parol evidence, unless in case of fraud or mutual mistake of facts; that this principle is applicable to cases of insurance contracts as fully as to contracts on other subjects; that provisions contained in fire insurance policies, that such a policy shall be void and of no effect if other insurance is placed on the property in other companies, without the knowledge and consent of the Company, are usual and reasonable; that it is reasonable and competent for the parties to agree that such knowledge and consent shall be manifested in writing, either by indorsement upon the policy or by other writing; that it is competent and reasonable for insurance companies to make it a matter of condition in their policies that their agents shall not be deemed to have authority to alter or contradict the express terms of the policies as executed and delivered; that where fire insurance policies contain provisions whereby agents may, by writing indorsed upon the policy or by writing attached thereto, express the Company's assent to other insurance, such limited grant of authority is the measure of the agent's power in the matter, and where such limitation is expressed in the policy, executed and accepted, the insured is presumed, as a matter of law, to be aware of such limitation; that insurance companies may waive forfeiture caused by non-observance of such conditions; that where waiver is relied on, the plaintiff must show that the Company, with knowledge of the facts that occasioned the forfeiture, dispensed with the observance of the condition; that where the waiver relied on is an act of an agent, it must be shown either that the agent had express authority from the Company to make the waiver, or that the Company subsequently, with knowledge of the facts, ratified the action of the agent."

Undue stress is sometimes laid on the fact that three of the nine Supreme Court judges dissented from the opinion. The wisdom and justice of the principles therein set forth and the logic of the arguments therefor would be no less if three only of the nine judges had concurred therein.

In illustrating the application of the doctrine of estoppel to the insurance policy, I shall not take time to seek or cite authorities for every statement of opinion. It is easily possible that every view expressed herein is contradicted by some or other decisions. Yet the opinions are expressed in the belief that they are in line with the weight of authority as found in the decisions of the State Courts.

The large majority of the State Courts seem to agree in declaring that if, at the execution and delivery of the policy, the Company had knowledge of an existing condition which, in the absence of such knowledge, would make the policy void, the Company is estopped from setting up such a condition as a defense to the insured's claim; and that the knowledge of the agent of the Company is to be considered the knowledge of the Company itself.

What should we understand by the phrase "Knowledge of the agent at the inception of the policy?" Many seem to think that it

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includes any knowledge that the agent may at any time have had, no matter how acquired. Let us consider what might be the effect of such a construction of the phrase. Suppose, for instance, that in negotiations relating to insurance issued or refused by Company A, its agent learns that the building stands on leased ground. Later, so much later that the entire transaction has faded from the agent's memory, the owner of the same building obtains from him a policy thereon of the New York Standard form, issued by Company B, of which he also is the agent. No disclosure is made of the fact that the building stands on leased ground. Conditions not provided for by the policy may at the time be such that, if aware of them, Company B, or perhaps the agent on his own initiative, would decline the risk as undesirable because of the fact that the building stands on ground not owned by the insured in fee simple. Is it just that Company B should be precluded from successfully asserting the policy provision in defense against the claim when it learns, after the fire, the facts as to the ownership of the ground?

Or let us suppose a person engaged, as so many are, in the business of Real Estate as well as that of Insurance. As a Real Estate agent he tries to effect a sale by A to B of a building occupied by A for the manufacture of some product, the process requiring the use of gasoline. While trying to effect the sale he learns of this customary use of gasoline. The sale falls through and A continues the occupancy of his building. Some time thereafter, there being nothing to recall to the agent's mind the fact that gasoline was used in the conduct of A's business, A applies to him for insurance on the building. The policy describes the building truly, but not exhaustively, as "occupied for manufacturing purposes." Had disclosure then been made to the agent of the use of gasoline, he would either have declined to issue the policy, or have attached a properly restricted gasoline permit to both policy and daily report, with the result that the Company, with that knowledge of the risk to which it is always entitled, would have had opportunity to order the cancelation. Is the Company, itself ignorant of the existence of the gasoline hazard, to be estopped from denying liability because of the knowledge obtained by its agent at a time long past, in a matter wherein he was engaged not as its agent, not as the agent of any other insurance company, not even in the insurance business at all, but in a business wholly separate

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and distinct? Too many people seem to think these and like questions should be answered affirmatively.

My belief is that, in order to be chargeable to the Company, the knowledge attributed to the agent must be proved to have been either acquired by him in the negotiations leading up to the issue of the policy or present in his mind when the policy was issued.

In the decisions I have read involving estoppel because of the agent's knowledge prior to issue of the policy, little is found to indicate that this view of the law has been called to the attention of the several courts. It seems generally to have been assumed that the knowledge was acquired as indicated in the preceding paragraph, or that the time and/or manner of its acquirement were immaterial; in other words, that knowledge acquired by a man at one time and for a particular purpose is to be considered his knowledge for all times, however late, and for all purposes, however foreign to the original.

I believe the view of the law above designated as the proper one should be urged upon the court in any case that involves this feature of an agent's knowledge.

It has been contended that the Company is estopped from asserting a defense to a claim under its policy, because of conditions antedating the latter concerning which no inquiry was made of the insured, the existence of which would have been disclosed by an examination, in advance of the issue of the policy of the public records. We find what seems to be a proper statement of the law in the opinion of the Wisconsin Supreme Court, in deciding the case of *Wilcox v. Continental Insurance Company*, 85 Wis. 193. This was an action to recover for loss by fire of a horse covered by a policy containing the usual conditions against other insurance and chattel mortgage. The complaint alleged, in addition to the loss sustained, the issue of the policy without inquiry as to title, or as to other insurance; it also set forth the policy conditions above referred to, and the existence at the inception of the policy of the other insurance and the chattel mortgage. The Company demurred to the petition, and the court sustained the demurrer.

So far as I have been able to learn by inquiry, this question has not been decided by the New York Courts. I believe our New York Court of Appeals would hold as did the Wisconsin Supreme Court in the *Wilcox* case, were it asked to decide the same question.

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The provisions of the New York Standard Fire Insurance Policy, which declare that in certain circumstances it shall be void, are contained in lines 7 to 30 inclusive. The framers of the policy have undertaken to draw a distinction between those provisions in lines 7 to 10 inclusive, and those in lines 11 to 30 inclusive.

The former paragraph provides, unconditionally, that the policy, in certain circumstances, shall be void; the latter, that in certain other circumstances the policy shall be void unless otherwise provided by agreement endorsed thereon or added thereto. This distinction is very plainly indicated in the General Anti-Waiver Clause which, as we have seen, attempts not only to restrict waiver to waiver in writing, but also to restrict even written waiver, to such conditions as, by the terms of the policy, may be the subject of agreement endorsed thereon or added thereto. It was evidently the intention of the framers of the policy to put lines 7 to 10 inclusive absolutely beyond the power of the local agent to waive.

The language in lines 8 and 9, "or if the interest of the insured in the property be not truly stated herein," seems to me to be necessarily construed as if it read, "be untruly stated herein;" for manifestly a policy issued without any statement whatever as to the interest of the insured, must be valid if that interest conforms to the requirement of the policy (see lines 11, 16, and 17); that is, be the sole and unconditional ownership.

It is conceivable that the insured's interest in the property might be untruly stated in the policy, and that a jury might find that in applying for the insurance the insured had truly stated to the agent the nature of his interest in the property. Probably in the majority of the State Courts the doctrine of estoppel would in such a case be applied by a court of law in an action under the policy, in spite of the fact that the language quoted is unconditional.

The last provision in this paragraph is that in lines 9 and 10: "Or in case of any fraud or false swearing by the insured touching any matter relating to this insurance, or the subject thereof, whether before or after a loss."

"Before a loss" includes also before the execution of the contract, and it is my understanding that out of considerations of public policy a defense based upon fraud or false swearing can not be waived by the agent, whether at the inception of the policy or later. Even so, any company representative having knowledge

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of such fraud or false swearing by an insured as would avoid the policy, should, until those higher in authority, with knowledge of the facts, instruct him otherwise, carefully abstain from any word or act that might afford any pretext for the application of the doctrine of waiver and estoppel. "Safety First."

Let us now consider the doctrine of estoppel as applied because of the agent's knowledge at the inception of the contract to the conditions of the policy contained in lines 11 to 30 inclusive.

OTHER INSURANCE.

"THIS ENTIRE POLICY, UNLESS OTHERWISE PROVIDED BY AGREEMENT ENDORSED HEREON OR ADDED HERETO SHALL BE VOID (LINE 11)."

"If the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy" (lines 11 to 13).

Knowledge by the agent of the amount of other insurance, existing at the inception of the policy, while not warranting the insured in adding to it, is tantamount to a permission to maintain other insurance to that extent during the life of the policy, even though after its inception such other insurance be diminished in amount and, later, restored to its original amount. But knowledge of part only of the other insurance does not estop the Company from setting up, as a defense to the claim, the other insurance of which it had no knowledge. (Philadelphia Underwriters, etc., v. Bigelow, 33 Ins. Law Journal 948, 37 S. R. 210.)

MANUFACTURING ESTABLISHMENTS OPERATED OVERTIME.

"Or if the subject of insurance be a manufacturing establishment and it be operated in whole or in part at night later than ten o'clock (lines 13 and 14)."

The better doctrine seems to be that knowledge by the Company's agent, at the inception of the policy, of an intended violation thereof does not estop the Company from defending on the ground of the violation after it has occurred.

But this does not seem to apply in case of an intention to continue, in violation of terms of the policy rendering it void *ab initio*, a condition existing, to the knowledge of the Company's agent, at the inception of the contract. So, if the agent of the Company issues the policy with knowledge that the subject of insurance is a manufacturing establishment and is then being operated in whole or in part at night later than ten o'clock, the as-

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sured may continue to operate at night later than ten o'clock at least until the time comes when it ceases to be operated, even though not longer.

UNCONDITIONAL AND SOLE OWNERSHIP.

"Or if the interest of the insured be other than unconditional and sole ownership (lines 16 and 17)."

This language seems to apply only to a case where the insured has an insurable interest in the property. If the agent knows at the inception of the policy that this interest is less than unconditional and sole ownership, the Company is thereby estopped from denying liability on that account. I know of no case where the doctrine of estoppel has been invoked to give life to a policy issued to one or more with no insurable interest whatever in the property. Such an effort would, I think, be in vain as the policy would at its inception be a wager contract which, so far as I know, the courts uniformly refuse to enforce on grounds of public policy.

BUILDING ON GROUND NOT OWNED BY THE INSURED IN FEE SIMPLE; CHATTEL MORTGAGE; ILLUMINATING GAS VAPOR; AND MEMORANDUM ARTICLES.

"Or if the subject of insurance be a building on ground not owned by the insured in fee simple (lines 17 and 18);

"Or if the subject of insurance be personal property and be or become incumbered by a chattel mortgage (line 18);

"Or if illuminating gas or vapor be generated in the described building (or adjacent thereto) for use therein (lines 22 and 23);

"Or if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above described premises, bezine, benzole, dynamite, ether, fireworks, gasoline, Greek fire, gunpowder exceeding twenty-five pounds in quantity, naphtha, nitroglycerine or other explosives, phosphorus, or petroleum or any of its products of greater inflammability than kerosene oil of the United States standard (which last may be used for lights and kept for sale according to law but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight or at a distance not less than ten feet from artificial light). (lines 23 to 28)."

Each of these provisions relates to conditions existing at the inception of the contract as well as to those arising thereafter, and, as a rule, is subject to the operation of the doctrine of estoppel in case of knowledge on the part of the agent.

Certain of the conditions in lines 11 to 30 inclusive of the New York Standard policy have no application to the inception of the policy, but affect only the time subsequent thereto and prior to the loss. They are as follows:

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INCREASE OF HAZARD; FORECLOSURE PROCEEDINGS; CHANGE IN INTEREST, TITLE, OR POSSESSION; AND ASSIGNMENT OF POLICY BEFORE LOSS.

"Or if the hazard be increased by any means within the control or knowledge of the insured (lines 14 and 15);

"Or if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed (lines 18 to 20);

"Or if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process or judgment or by voluntary act of the insured, or otherwise (lines 20 to 22);

"Or if this policy be assigned before a loss (line 22)."

Discussion of these conditions has manifestly no place in this part of this paper.

We have now mentioned or discussed, as of the time up to and including the inception of the contract, all conditions contained in lines 11 to 30 inclusive, except the following:

CESSATION OF OPERATION OF MANUFACTURING ESTABLISHMENT; EMPLOYMENT OF MECHANICS; AND VACANCY OR UNOCCUPANCY.

"Or if the subject of insurance be a manufacturing establishment and it cease to be operated for more than ten consecutive days (lines 13 and 14);
"Or if mechanics be employed in building, altering, or repairing the within described premises for more than fifteen days at any one time (lines 15 and 16);

"Or if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied and so remain for ten days (lines 28 and 30)."

As bearing on the effect of the knowledge of the agent at the inception of the contract, so far as these three conditions are concerned, let me call to your attention a very interesting opinion—that of the Wisconsin Supreme Court in *re England, et al. v. Westchester Fire Insurance Company*, 81 Wis. 583, 21 Insurance Law Journal 808. The policy involved contained a ten-day vacancy permit similar to that in the New York Standard Policy and was issued with knowledge on the part of the Company's agent that it covered on a vacant building. The vacancy continued to the time of the fire, more than ten days after the inception of the policy. The Company's defense to the action was the vacancy beyond the period covered by the vacancy permit. Plaintiffs contended that, because of the issue of the policy with knowledge on the part of the agent that the building was vacant, the Company was estopped

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from setting up the vacancy in defense to the claim. The court held that there was no estoppel; that the Company had a right to assume that the assured would comply with their duty to provide an occupant for the building, within ten days, and that the Company was not liable for the loss.

If this opinion is good law, as it probably is, it construes for us, with reference to the doctrine of estoppel, not merely the ten days' vacancy permit, but equally the ten days permit for cessation from operation of a manufacturing establishment (see line 14) and the fifteen days mechanics permit (see lines 15 and 16 of the New York Standard Policy).

From the foregoing, we may conclude that, according to the majority of the State Courts, the knowledge of the agent at the inception of the contract may work great havoc in the policy as issued, and the contract as understood by the Company at the time the issue of the policy is reported to it and it is called upon to decide whether the policy is to be allowed to continue because desirable, or is to be canceled as undesirable.

Let us now consider the second period—the period from the inception of the contract to the happening of the loss.

Of the conditions arising during this period that may possibly invoke the doctrine of estoppel, four seem to justify our consideration:

1. Notice to the agent of a violation of a policy condition. As to this, a few jurisdictions only have held that if such knowledge comes to an agent it becomes the Company's duty to cancel the policy; failing to do which, the Company is held to be estopped from setting up the violation.

2. Collection of the premium by an agent with knowledge of a violation. This would be held by all, or nearly all, of the State Courts to invoke the doctrine of estoppel on the theory that the Company would not accept the premium on a policy which had been void from its inception, except with the intention of treating it thereafter as a valid contract, so far as its validity depended on facts of which, at the time, it had knowledge.

I am not referring to the propriety of this ruling—merely its probability.

3. Notice of cancelation, in accordance with lines 51 to 55, inclusive, of the policy, whereby the policy is to cease and deter-

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mine at the expiration of five days from receipt by the assured of the cancellation notice. It seems inevitable that from the time of the service of the cancellation notice to the expiration of the five days, the policy is declared by the Company to be valid, so far as it has any knowledge of the facts. For, if the Company, by reason of a known violation of its policy, were exempt from liability, there would be no reason in its parting with unearned premium which it could safely earn by the simple expedient of withholding cancellation notice.

4. Knowledge by the agent of the violation of a policy condition at the time of the making of an endorsement on the policy, or a correction thereof in writing:

Reading of precedents leads to the conclusion that when a policy once issued is changed by an authorized representative of the Company having knowledge of all material facts, whether the change be by way of correction or of amendment, the rights of the parties are the same from that instant as if, with this knowledge, the policy had been canceled and a new policy, conforming to the original policy plus the correction or amendment, had been issued.

The effect of the agent's lack of knowledge in such a case may not be the same as in the case of the issue of a new policy. For instance, suppose a policy to be void because of a violation of the provision regarding increase of hazard, no other provision of the policy being affected. If, without knowledge of such increase of hazard, an endorsement other than consent to an assignment be made upon the policy, such endorsement would not necessarily validate the policy. Whereas, if the policy expires or is canceled, and is succeeded by another policy identical in terms, the effect of the provision against increase of hazard is lost, the hazard having existed at the inception of the policy.

We come now to the consideration of the third period in the life of a policy—the period beginning with the happening of the loss and ending with the time when the rights of the parties are adjusted. To this period we must give most careful attention, as every error is costly.

To catalogue for you all the ways in which estoppel may arise during this period would be impossible. I hope, however, to indicate the most fruitful sources of trouble in this regard, and it is quite possible that a study of these will shed light on such as may escape attention at this time.

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FORMAL NOTICE OF LOSS.

"If fire occur the insured shall give immediate notice of any loss thereby in writing to this Company (line 67)."

This clause, at first reading, seems to accord the Company a definite and valuable protection. In practice, the benefits are shadowy.

The word "immediate" is of very indefinite significance; its meaning in any particular case depending, to a great extent, on the peculiar circumstances thereof. For instance, the insured can not be penalized for not notifying the insurer of a loss of which he is ignorant. And when he has learned of the loss he must be allowed a reasonable time within which to give notice to the insurer.

If the insured is present at the outbreak or during the progress of the fire, he must obviously give the Company earlier notice than if, by reason of his absence from home, illness, or any other disability, his knowledge of the fire is delayed. The earlier he learns of the fire, the earlier, other things being equal, he must give the Company notice.

So, if he should happen to learn of the loss in such circumstances as to allow his giving the Company notice within, say, an hour of its occurrence, he should give it within the hour. Whereas, if he receives word in the depths of a wilderness, quick action in delivery of the notice to the Company can not reasonably be expected of him.

In certain circumstances the insured is relieved of giving notice in writing; as when an authorized representative accepts oral notice as satisfactory, particularly if the Company takes action thereon.

In certain circumstances, too, the insured is relieved of giving any notice whatever; as when the Company learns of the loss independently of the insured, particularly if it takes such action as indicates that it is advised in the premises.

As a practical proposition, circumstances are seldom, if ever, found where a Company could have a valid defense based solely on failure of the insured to comply with this requirement of the policy. Failure to comply with the policy in this respect is almost certain to be associated with failure to comply with the policy in other respects. In other words, a Company is not likely to have a defense based upon failure of or delay in notice, without having

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a very much better defense on some other ground. In such case, however, failure of or delay in notice may be of material value to the Company as an added defense.

On receipt of notice of a loss the most natural and usual thing for a Company to do is to send some person of adequate experience to the place of the fire to ascertain conditions as then appearing. And this is true, even though at the time the Company may be fully advised of a violation of the policy.

In a very few States it is held that even so slight an act as the mere sending of a person to inspect the place of the fire is sufficient to estop the Company from setting up its defense, even though no questions are asked of the insured, and the latter is put to no trouble or expense.

This is an extreme application of the doctrine and, that it is unreasonable, may be presumed from the fact that it has obtained little currency. It is conceded in nearly all jurisdictions that the representative of a Company has the same freedom of action in examining the place of the fire accorded to the casual passerby, with no greater interest than that of curiosity. And as the casual passerby may use his eyes even to the extent of entering upon the premises to secure a better point of view, provided it be accessible, so, in nearly every State in the Union, may the Company representative do the same with no greater peril to himself and with none to his employer's rights under the policy. So, too, outside of the few States referred to, may he gratify his curiosity by making all the inquiries he wishes of such people as are willing to be interrogated.

PROTECTION AND SEPARATION.

"If fire occur the insured shall * * * protect the property from further damage, forthwith separate the damaged and undamaged personal property, etc. (lines 67 and 68)."

This clause in the policy is usually more honored in the breach than in the observance; at least, so far as Metropolitan losses are concerned. The reason for this lies in the fact that the adjuster's demand for proper protection and separation is met by the statement, however absurd, that the protection and separation already accorded the goods are the best possible under the circumstances.

Arguing these questions means delay, and delay very frequently means deterioration of the damaged property with a serious consequent loss, which, while it should of right, be borne by the insured, it may be difficult to make him bear.

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A denial of liability waives the right of separation, and, probably, the insured's obligation to protect the property from further damage.

An ascertainment of sound value and loss by the insured and the Company without resort to appraisal, is probably a waiver of the Company's right to a separation, but apparently leaves the insured under obligation to protect the property from further damage, as the Company appears to have a right, according to lines 4 and 5, to take all, or any part, of the articles at their ascertained value.

Discussion of this feature of the policy is hardly important as conditions can rarely arise in such a case which would make it to the interest of the Company to take any of the property at its ascertained value.

EXHIBITION OF PROPERTY.

In lines 81 and 82 it is provided that the insured, as often as required, shall exhibit to any person designated by this Company all that remains of any property described in the policy. To avoid a waiver of this right it should be exercised within a reasonable time. One can not lay down a universal rule to determine in every case how soon such exhibition should be demanded. Undoubtedly each case will have to be judged by itself, and what will be a reasonable time in one case, may be an unreasonable time in another. Manifestly, perishable goods such, for instance, as fresh vegetables, could not possibly be held for examination so long as less perishable property, such as piece goods; and, in turn, piece goods so charred or wet as, in time, to become offensive, could not reasonably be held for examination so long as, let us say, crockery.

To avoid not merely a waiver, but the possibility of a waiver, all needed examinations of the property should, preferably, be made as promptly as possible.

EXAMINATION UNDER OATH.

In line 82, we find that the insured is required to submit to examinations under oath by any person named by the Company and subscribe the same. If the Company desires to preserve this right, the safest way is to make a demand for such examination, as early as possible. Here again the circumstances of the individual case must, to a large degree, determine how late in the negotiations a demand for examination under oath may be made.

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That there is no definite period within which a demand may properly be made, and beyond which it may be safely ignored by the insured, is evidenced by the fact that, as often occurs, the necessity or desirability of an examination under oath does not become manifest until the sixtieth day after receipt of proofs, or, in special cases, even later; and that demands therefor made thus late in the day are almost always acceded to by the insured, even when acting in accordance with legal advice.

The right to examine the insured may be waived by a denial of liability; or by a promise to pay, unless the Company is induced to make such promise by fraud, misrepresentation or concealment.

EXAMINATION OF BOOKS OF ACCOUNT, ETC.

In lines 83 to 85 of the policy, we find it stated that the insured, as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof if originals be lost, at such reasonable place as may be designated by the Company, or its representative, and shall permit extracts and copies thereof to be made.

Like the examination of the insured under oath, the production of books, bills, invoices, etc., should be demanded as early as practicable, the time within which such demand may properly be made, depending, of course, upon the circumstances of the particular case.

This right also may, of course, be waived by a denial of liability. In the absence of fraud on the part of the insured, it probably expires when the amount of loss is conclusively ascertained and determined by the insurer and all parties in interest. And, likewise in the absence of fraud, misrepresentation or concealment, it terminates upon an adjustment and promise to pay.

APPRAISAL.

This right may be waived in several ways. Most frequent among them are: Denial of Liability; promise to pay; delay on the part of the Company in demanding the appraisal; delay on its part in proceeding with the preliminaries after demand has been made; and by interference with the appraisers in the discharge of their duties.

The appraiser designated by the Company may, by his improper conduct, entitle the insured to repudiate the appraisal agree-

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ment, in which case he may very reasonably be considered as excused from entering upon another.

The subject of appraisal has been so fully treated elsewhere in this series that it seems inappropriate that I should take up more time with this branch of the subject.

We shall have frequent occasion to refer to something written, spoken, or done by the adjuster. In every case please understand this as meaning something written, spoken, or done by some authorized representative of the Insurance Company, with knowledge of one or more violations of the conditions of the policy.

We shall use the word "adjuster" in referring to the Company's representative, as, in the majority of cases, the person dealing on behalf of the Company with the insured is properly so described. To be strictly accurate, perhaps we should distinguish the independent adjuster whose employment by the Insurance Company is always with reference to the particular loss from the representative possessing general authority on behalf of the Company. The distinction would rest upon whatever distinction is drawn by the courts between the two kinds of employment. The effect of the distinction, when made, is to hold that the independent adjuster, employed each time for a particular loss, is supposed, where no greater authority in him is proved, to be authorized only to ascertain the circumstances of the loss and to agree with the insured as to the sound value of the property and the loss thereon.

It has been held that an adjuster so employed is without authority to waive defenses, whether by denial of liability, by demand for proofs of loss with knowledge of a defense, or by a promise to pay. But for the practical purposes of this paper, we may assume that the independent adjuster needs to be as careful to avoid danger from the doctrine of estoppel as he who is employed by the Company on a salary and as a General Adjuster.

In referring to knowledge, actual knowledge is meant, however obtained. Mere supposition, or a statement in such terms or from such source that one would not be justified in risking anything thereon is generally understood not to be such knowledge as suffices for the application of the doctrine of estoppel.

But when knowledge of a violation is actually acquired by the adjuster, he cannot, without risk, proceed along any line which could be considered as consistent only with an intention to recognize the policy as a valid and subsisting contract.

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In every case, whether the Company expects to resist the claim or to pay it, it is always advisable to ascertain and determine the amount of loss, so that that factor may be permanently eliminated from any controversy that may arise between Company and insured. This is to the interest of both, the insured being, in event of contest, relieved from the necessity of proving, at great expense, the amount of loss, and the Company from disproving, at great expense, the amount of loss testified to on behalf of the plaintiff.

The advantages of the ascertainment and determination of loss are, as a rule, fully as great to the insured as they possibly can be to the Company. Of course, if the loss is so great that the Company, if liable at all, is liable for the face of its policy, the advantage of an ascertainment disappears. And if the facts of the case are such that the insured cannot by any possibility maintain a claim, the ascertainment of the loss may be dispensed with. But one needs to be very sure of one's facts and the law relating thereto before he can, justifiably, leave the sound value and loss open for determination at some indefinitely future time.

For this reason it is, as a rule, preferable that the adjuster's knowledge of a violation of the policy be deferred till after the loss has been definitely ascertained and determined, because without imputable knowledge there can be no waiver or estoppel. It is, therefore, always well to defer, till after ascertainment and determination of loss, the search for knowledge that cannot possibly escape one, as for instance, knowledge to be obtained from examination of the public records. Sometimes the knowledge comes unsought, but unmistakable.

Then the adjuster seeks freedom to act without danger of estoppel under a non-waiver agreement with the insured; failing in which, he or someone higher in authority, must decide for the Company on one of three courses:

First, to rest on the defense which, according to its information, is available to it, and desist from further negotiations with the insured in order that there may be no appearance on its part of recognizing the validity of the policy;

Second, to try to steer between Scylla and Charybdis in an effort to limit the loss without jeopardizing a known defense; and

Third, to proceed along whatever line seems best adapted for the limitation of the loss, regardless of the peril of estoppel.

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DEMAND UPON THE INSURED FOR PROOF OF LOSS.

One of the earliest nuggets of knowledge that an adjuster acquires from practical experience is that, with knowledge of a defense, it is dangerous to make demands upon an insured, the danger being that the adjuster's action will be construed as a recognition of the validity of the policy. This danger extends in most jurisdictions to a demand for proof of loss.

Mr. George Richards, in his valuable work on Insurance Law, third Edition, Page 180, says:

"Demanding the usual verified proofs of loss in itself effects no waiver or estoppel. No matter how many grounds of forfeiture the Company may suspect or believe to exist, it is entitled to insist upon the contract provisions framed for the very purpose of enabling it to pass upon and estimate intelligently the nature and amount of the loss."

If Mr. Richards intended this language to apply only to the cases where the Company entertained a suspicion or belief without, however, being actually in possession of knowledge and without having been put upon its inquiry as to the facts, I should accept, without question, the opinion quoted; for elsewhere in this paper it is indicated that knowledge, as a basis for estoppel, means actual knowledge. But I think Mr. Richards means us to understand that the Company, even with actual knowledge of the violation of a policy condition, may, without waiving the forfeiture or being estopped from asserting it, demand such proof of loss as is required in lines 67 to 76 of the policy. For, on page 182, in support of the opinion quoted above, Mr. Richards says:

"Opposed to the formidable array of authorities upon this practical point as cited in the notes we find, however, numerous court opinions and text-books in which the statement is made broadly that calling for proofs of loss waives any known forfeiture, or estops the insurer from insisting upon it, but in most of such opinions by the judges it will be found that the remark was a mere dictum, and that in the facts of the case the Company was shown to have put the insured to an unreasonable burden of trouble and expense by calling for additional or extraordinary proofs over and above what the policy prescribes as necessary without special demand."

The Supreme Court of California (*McCormick v. Springfield F. & M. Ins. Co.*, 66 Calif. 681; *Wheaton v. North British & Mercantile Ins. Co.*, 76 Calif. 431; *McCormick v. Orient*, 86 Calif. 260), and the Supreme Court of Tennessee (*Boyd v. Vanderbilt Ins. Co.*, 90 Tennessee 212) have, indeed, ruled on this question in accordance with Mr. Richards' opinion. But my own observation leads me to share the belief held by a large number of experienced adjusters and specialists in insurance law, that in nearly all jurisdictions it is always with peril to a known defense

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that a Company demands proofs of loss, even if only those which by the terms of the policy must be rendered as a condition precedent to the maintenance of a claim.

The Supreme Court of Tennessee, in giving a decision similar to the California decisions just referred to, says:

"The cases of *Insurance Co. v. Norton* (96 U. S., 234), and *Titus v. Insurance Co.* (81 N. Y., 410) cited by counsel for appellant, were cases involving conduct after forfeiture, but before a loss had occurred. They do not support the assignment. The other cases cited are not accessible. It is inconceivable, though, that they should be authority for the position that, if the insurer after a loss requires proof of loss, it thereby waives all right to set up as a defense that it is not liable by reason of the fact that it never had a valid contract at all. (*Boyd v. Vanderbilt Ins. Co.*)"

One might reasonably hesitate to demand any proofs of loss even in Tennessee as by this time the court's library may have been enlarged.

Prudence dictates the advisability of refraining from making any demands upon the insured after one is chargeable with knowledge of the violation of a policy condition.

Opinions in various parts of the country seem to differ as to the effect of a demand ignored by the insured. Some, having experience and judgment, believe that a demand, say for proofs of loss, in the face of a known violation of a policy condition, is a recognition by the Company of liability, so far as that particular policy is concerned. Failure to comply with the demand for proofs of loss might or might not be an available defense according to circumstances.

Others hold that a demand for proofs of loss, with knowledge of a violation, works no estoppel as to any of the Company's rights, unless the demand be complied with by the insured.

DEMAND FOR APPRAISAL.

Were it not for a special provision in the policy, which might be referred to as the "Special Anti-Waiver Clause," a demand for an appraisal, or for any examination provided for in the policy, would without doubt be attended with the same risks as those we have just discussed as attending the demand for proofs of loss. The Special Anti-Waiver Clause is found in lines 92 and 93 of the policy and reads as follows:

"This Company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal, or to any examination herein provided for."

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This language appears to be clear and unmistakable, and it is difficult to see how it could be improved upon. It should be an absolute protection to the Company within the scope of its manifest intent. But adjusters of experience, knowing the ability of courts to discover unexpected meanings in language apparently clear and unambiguous, hesitate somewhat to demand an appraisal or any examination provided for in the policy if they are aware of any defenses to the claim which they desire to preserve. This special Anti-waiver Clause may mean just what it says. But we shall never feel quite confident that it does until some Insurance Company with more than usual courage or impelled by extraordinary need carries the clause to the Court of Appeals for construction and obtains a decision that supports the manifest meaning of the language quoted.

WAIVER OF PROOF OF LOSS.

The duty of the insured to render a sworn statement of loss is created by the conditions contained in lines 67 to 76, inclusive, of the New York Policy.

Reference is made in the policy to "proof of loss," a phrase familiar to us all.

The Court of Appeals of New York, in the case of *McAllester v. Niagara Fire Insurance Company*, has construed this phrase as including nothing more than the sworn statement of loss provided for by lines 67 to 76.

There are three ways in which the insured may be relieved of the necessity of rendering the so-called proof of loss as a condition precedent to a right of action. They are: Denial of liability; an adjustment and promise to pay; and an examination under oath, covering the subjects concerning which the insured is, by the policy, required to make disclosure in his proof of loss.

WAIVER OF DEFECTS IN PROOF OF LOSS.

If the Company knows of no defenses to the claim and desires the information which it would receive if the defects were remedied, it may with reasonable safety call attention to the defects and demand that they be supplied. In the majority of cases, however, no irretrievable loss accrues to the Company if it waives its right to call for the information omitted. But whether the omission to ask for the completion of proofs is intentional or the

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result of carelessness, it is the almost universal rule that retention of defective proofs, without objection, is a waiver of any defense based upon the defects.

Defects in the proof may be waived by a

DENIAL OF LIABILITY.

A lesson early learned in the hard school of experience, if not before, is that a denial of liability gives an immediate right of action. Just how much of the policy is waived by a denial of liability depends upon the time when, and the manner in which the denial of liability is made. If made without assignment of any ground therefor, or if it contains specific reference to every defense of which the Company is aware, a denial of liability probably waives compliance on the part of the insured with every requirement relating to matters subsequent to a loss, except such requirements as in themselves contribute to the defenses because at the time of the denial they have not been complied with, the time within which compliance is required having elapsed. As to the requirements relating to matters subsequent to a loss with which the insured at the time of the denial still has time for compliance, the denial of liability is without doubt a waiver.

Opinions differ as to whether a Company, denying liability on one or more specific grounds, thereby waives its right to assert any other defenses of which at the time of denial it is aware. Precedents can be found for holding that failure to specify a known defense, when denying liability specifically on other grounds, is no waiver of the defense of which mention is omitted. But I believe the weight of authority to be against this view. Certainly the principle of "safety first" is the better sustained if, in the denial of liability, either no reference is made to any particular defense, or specific reference is made to each known defense.

REJECTION OF PROOFS OF LOSS.

There seems to be a widespread superstition among adjusters, including special agents and Company representatives generally, that if a proof of loss rendered to the Company by the insured is found, on examination, to contain erroneous statements, whether relating to sound value, loss or damage, or any other material fact

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the proofs must be "objected to" or "rejected." Perhaps this is the best opportunity one can have for doing a little missionary work in this respect.

The desire to reject the proofs is generally explained on the ground that by the retention of the proofs without objection, the Company concedes the truth of the statements therein contained, including those as to sound value and loss. The fact is, however, that retention of proofs of loss without objection waives nothing at all, except the right to defend on the ground that they were not in the form required by the policy.

The courts seem to be unanimous in this: That when an Insurance Company receives a document which is evidently an attempt on the part of the insured to comply with the requirements of the policy as to proof of loss (see lines 67 to 76) it must, within a reasonable time, call the attention of the insured to any defect which it wishes him to remedy, and that failing so to do, its right to object to the proof as not in proper form is waived. But objections to proof of loss may properly be restricted to matters of form only. In fact it seems desirable that they should be so restricted.

PROOFS OF LOSS AS EVIDENCE.

Proofs of loss by themselves are admissible only for the purpose of proving that they were rendered to the Company. When, on the trial of an action under the policy, the proofs of loss are introduced in evidence by the plaintiff's attorney, the attorney for the defendant usually objects to their introduction as evidence for any other purpose than that just specified. If, against the defendant's objection, the court admits the proofs of loss as evidence on any other point, this ruling of itself requires the court above to reverse the decision or remand the case for a new trial.

Some courts go even further, and hold that even though the defendant's attorney makes no objection when the proofs are offered in evidence, they may not be considered as evidence of any other fact than that they were rendered by the assured to the Company.

In a certain reported case witnesses for the defendant testified on the trial that the schedule attached to the proof of loss was correct as to description and quantities of the articles therein set forth and as to the loss and damage thereto. The court held that in the light of this testimony the schedule was admissible as evidence of the amount of loss.

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This may seem an exception to the rule above stated, but on reflection it will be seen that no greater evidential value was accorded to this schedule than would have been accorded to any other schedule that might be thus offered in evidence.

It is rarely of any advantage to the Company to object to a proof of loss on the ground of defect in form, and in many cases it is a source of danger, particularly when the proofs may be regarded as hostile. Hostile proofs are usually prepared by the insured's attorney, or by some other competent adviser, who knows perfectly well how to comply with the requirements of the policy if it is his desire so to do. Usually, in preparing the proofs, he has the advantage of knowledge of any violation by the insured of the conditions of the policy, and he may be confident of his ability to prove that at the time the proof was rendered the Company was chargeable with knowledge of the violation. Any defect in form of a proof so rendered may be intentional, and designed to entrap the Company into making objection thereto. For, were the Company so to object, the remedying of the objection, which would surely follow, would estop the Company from asserting any defense of which it could be proved to have had knowledge when the objection was made.

Due regard for the Company's protection suggests that the proofs be accepted without objection and that the missing information be obtained in some other way. It is, of course, possible that owing to peculiar conditions a Company may feel the need of obtaining the insured's statement in writing and so would rather waive a known defense than waive the defect in the proofs; but such cases are unusual.

PROMISE TO PAY.

Many a Company representative has been astonished and grieved at learning from the plaintiff's testimony in a suit brought to recover a loss that, whereas he had supposed that he was merely agreeing with the insured as to the amount of loss, he had, as a matter of fact, adjusted the loss and made a definite promise that it should be paid. However far the finding of the jury in this respect may be from the truth, the finding usually governs.

An ascertainment of the loss, coupled with a promise to pay, is, in the absence of fraud, misrepresentation or concealment, a settlement of all questions arising under the policy, the only por-

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tion of which then remains effective being the conditions, if any, as to time and mode of payment; for it is safe to assume that a promise to pay, without any stipulation, means a promise to pay at the time specified in the policy.

WAIVER BY OFFER TO REBUILD OR REPLACE.

The contract is, as we know, a contract of indemnity, and there is but one way in which the Company can be compelled to do anything other than to pay in money the amount of its indebtedness when the same shall have been properly ascertained. The exception referred to is this: That the Company may have notified the insured of its intention to repair, rebuild or replace. For the New York Standard Policy provides that it shall be optional with the Company to take all or any part of the articles at their ascertained or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice within thirty days after the receipt of the proof required by the policy of its intention so to do (see lines 4, 5, and 6).

If the Company gives notice of its election to repair, rebuild or replace, the contract ceases to be one of indemnity. And whatever it has elected to do, it must do, no matter how great the cost. So long as the contract remains one of indemnity (and only the Company can convert it into anything else), the amount of insurance under the policy is the maximum limit of the Company's liability. But when the contract has been converted into one to repair, rebuild or replace, the face of the policy ceases to have any limiting effect. Furthermore, in the absence of fraud, concealment, or misrepresentation, the conditions of the policy governing it as a contract of indemnity, cease to apply.

WAIVER OF RIGHT TO TAKE, REPAIR, REBUILD, OR REPLACE.

The right to take all, or any part, of the property at its ascertained or appraised value, as also that to repair, rebuild or replace the property lost or damaged with other of like kind and quality, whether relating to personalty or realty, expires by lapse of time, in accordance with the terms of the provision which creates it.

The Company loses the right by a denial of liability, or by an adjustment and promise to pay, whether in the case of personalty or of realty.

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It seems evident from the language of the policy that the right to take or replace must survive the ascertainment and determination of the loss, whether made by the insured and the Company, or by appraisers, as in the policy provided.

The Court of Appeals of the State of New York, in the case of *McAllester v. Niagara Fire Insurance Company*, proves to us that this is not the case as to a building. This decision attracted so much attention when it was handed down, and it is still so full of peril for any adjuster who is not acquainted with it, that it may be well to refer briefly to its effect.

The Company and the insured, it seems, were unable to agree as to the amount of the loss and, therefore, referred the question at issue to appraisers, as required by the policy. When the award was rendered the Insurance Company felt that it was for an excessive amount and decided to avail itself of its right, as it so considered it, to restore the building, which, it is to be supposed, it could do for a sum materially less than the amount of the award.

Three weeks after the award was served, the Company notified the insured of its intention to rebuild, and thirteen days later notified the insured that on the day of the notice it had sent its builder to commence rebuilding the house. Eleven days after this notice the insured wrote to the Company as follows:

"As we have already notified you, your right to rebuild is now gone. Anything you do in that direction is at your own peril. We shall not accept the house and shall sue you for the insurance money as soon as we can legally do so."

The court in its opinion holds in effect that the sworn statement rendered by the insured, in accordance with the requirements in lines 67 to 76 of the policy, constituted the proof referred to in line 5, and that the notice of the Company's election to rebuild, though given three weeks only after the service of the award, was not given till five and one-half months after the receipt of the proof required by the policy. It also holds, however, that as to a building, an agreement for the ascertainment of loss by appraisal is an election to pay the loss in money and a waiver of its right to rebuild.

There is no doubt that the same court would have been disposed to rule the same way, if it could, had the subject of insurance been personal property instead of a building. But such a ruling is, apparently, not to be feared. Let us re-read a part of lines 4 and 5:

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"It shall be optional, however, with this Company to take all, or any part, of the articles at such ascertained or appraised value, and also to repair, rebuild, or replace the property," etc., etc.

It is not only possible for a Company to take personal property at its appraised value, but companies quite frequently do so. It seems impossible, therefore, for any court to hold that an agreement to ascertain by appraisal the loss on personal property is equivalent to an election to pay only the loss so ascertained, the insured retaining the property.

WAIVER OF MATURITY.

In lines 93, 94 and 95 it is provided that the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this Company, including an award by appraisers when appraisal has been required.

This right of the Company to defer payment until sixty days after the happening of the specified events may be waived by denial of liability, which, as we know, gives an immediate right of action; likewise by an authorized promise to pay at an earlier date.

It often happens that when the amount of a loss which has been the subject of dispute is agreed upon by compromise, payment is made forthwith. This probably is because the Company feels that during the negotiations it has learned all the facts material to the case and has no expectation of learning anything more if payment be deferred, rather than because of any obligation to pay before the expiration of sixty days.

PROTECTION OF INSURER'S RIGHTS.

So long as our courts persist in making fish of insurance contracts and fowl of contracts of other kinds, I see no better way of safeguarding the rights of insurers, in part at least, than by the adoption of one or both of the following reforms:

(a) Resuming the old practice (not yet wholly discontinued, I believe), of basing the policy on a signed application of proper form, referred to in the policy and made part thereof.

(b) Making the policy a bilateral contract, in duplicate, signed by all parties—by insured as well as by insurer, and by beneficiaries also, if such there be.

The decisions relating to false statements contained in applications for insurance seem in an astonishingly large number of

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cases to have developed as to each, the fact as found by the jury, that the plaintiff had given the true answer to each question and that the company's solicitor or agent had inserted the false answer; wherefore it was held by the court as a matter of law, that the application was not that of the assured—that instead of his being bound by the false answer in writing over his signature, the Company was bound by the true answer given by him to its solicitor or agent—according to assured's testimony and the finding of the jury as to the facts.

One will search long for a recorded instance of a jury's finding that an assured had given a false answer to a question in an application blank. The solicitor or agent seems to have been in nearly every case a man willing to defraud some one, be it insurer or insured, in order that he might obtain his commission. The problem, then, would be how to prevent the applicant from signing an application without first seeing that all answers are truly set down.

If the companies ever undertake reform by returning to the signed application, I hope they will give consideration to these suggestions:

That a true copy of the application be attached to each policy even in the States where this is not required by statute:

That the application be printed in easily legible type; and

That in bold faced type, the most prominent on the sheet, enclosed in indexes and printed immediately above the space for signature, so that it cannot possibly escape the eye, should appear the following:

“Before signing, the applicant should carefully examine the foregoing questions, answers, statements and warranties, as they are material to the risk, and will be relied on by the Company in accepting or rejecting this application.”

It seems that any court of average fairness would probably hold, as a matter of law, that the company adopting this form of application had done all in its power to prevent an applicant from signing an untrue statement; and that any person signing such an application without first seeing that all errors were eliminated, must be deemed to have done so at his own risk and not entitled to relief from responsibility therefor on the stereotyped plea.

WAIVER OF EXEMPTION FROM ABANDONMENT.

It is provided in lines 5 and 6 that there can be no abandonment to the Company of the property described. It sometimes

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happens that the representative of the Company takes charge of what remains of the stock and proceeds to handle it for account of the loss, or for account of whom it may concern. It is quite probable that by so doing the Company is held to have waived its exemption from abandonment provided in the language just quoted, and, with it, almost any other of the conditions of the policy from the operation of which the insured desires to be relieved.

EXCLUSIONS.

From the foregoing it is evident that, according to the majority of the State courts, the knowledge of the agent at the inception of the contract may work great havoc in the policy as issued and the contract as understood by the Company at the time the issue of the policy is reported to it and it is called upon to decide whether the policy is to be allowed to continue because desirable or is to be cancelled as undesirable.

But there are some rights that I believe are preserved to the Company, in spite of the agent's knowledge. In lines 31 to 35 inclusive, we find that certain kinds of loss are specially excluded from the scope of the policy, regardless of the kind of property they may involve. In lines 38 to 42 inclusive, we find that certain kinds of property are specially excluded from the scope of the policy, no matter from what cause they are damaged or destroyed. I am unable to conjecture how knowledge by the Company's agent at the inception of the policy can be held to bring any of the excluded causes of loss or any of the excluded kinds of property within the scope of the policy.

It should ever be borne in mind that no one has ground for the expectation that any two cases involving the Doctrine of Waiver and Estoppel will be exactly alike. Therefore, each case must be carefully studied to learn its distinguishing characteristics so that the application thereto of the Doctrine of Estoppel may be intelligently determined.

XXXIV

ADMINISTRATOR: RIGHTS OF ADMINISTRATORS AND EXECUTORS OVER REAL PROPERTY

In Connection with the Standard Policy

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The general principle is that an executor or administrator has no interest in the real estate of the deceased, except so far as may be given to him by statute, or, in the case of executors, by the will of the deceased. An executor, as you know, is a person appointed by the testator to carry out the terms and requests in his will, and to dispose of the property after his decease according to his testamentary provisions. An administrator is one appointed by the Probate or Surrogate's Court to administer the estate of a deceased person who left no will. He resembles an executor, but being appointed by the court and not by the deceased, he has to give bond for the faithful discharge of his duties.

The title to real estate vests directly in the heirs immediately upon the death of the owner, and the heirs may exercise all their rights without any administration. It is only as legislation or the will of a testator may have conferred an express power upon an administrator or executor that he can exert it in respect to the real estate.

When the will does not devise to an executor the devisee is the only person who has the right to the possession of the real estate. The devisee, in other words, takes directly under the will and not through the executor. Where there is no will the general rule of descent applies, namely, that the real property of a person who dies without devising the same descends *first* To his lineal descendants, *second* To his father, *third* To his mother, *fourth* To his collateral relatives. In other words, an administrator as such has no authority or control over the real estate of the deceased, and an executor has none unless given to him by the will, though, if necessary, the real property may be ordered sold to pay debts. In New York the legislation on the subject is that real property may be mortgaged, leased or sold under order of the court for any or all of the following purposes:

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1. For the payment of the debts of the decedent, including judgment or other liens, excepting mortgage liens, existing thereon at the time of his death.

2. For the payment of his funeral expenses, including therein suitable church or other services, a burial lot and a headstone erected thereon.

3. For the payment of the reasonable expenses of administration as allowed by the surrogate.

4. For the payment of any transfer tax assessed upon the transfer of such property.

5. For the payment of any debt or legacy charged thereupon.

No mortgage, lease or sale shall be ordered for the purpose of any of the foregoing payments, if there be personal property applicable to the full payment and discharge thereof.

Such real property may also be sold:

6. For the payment and distribution of their respective shares to the parties entitled thereto, where any or all of said parties are infants, proven or adjudged incompetents, absentees, or persons unknown, whenever in his discretion the surrogate may so direct.

With these preliminary remarks let us consider the rights of executors and administrators under the standard policy conditions, the subject of insurance being real property. Neither the word executor nor administrator appears in the policy, and as those words have to do with persons whose authority and powers arise after death we naturally look for the word "death" and find in line 20 that the policy is void if any change, other than death of an insured, takes place in the interest, title or possession of the subject of insurance, except change of occupants without increase of hazard.

So death does not void the policy, and at line 108 we find that wherever the word "insured" occurs in the policy it shall be held to include the legal representatives of the insured. Who then is the insured at the time of loss where the fire occurs after the death of the original insured? Who is the legal representative of the insured where the subject of insurance is real estate? Who may sue for a building loss that occurs after the death, but during the term of the insurance?

These questions have been considered by our courts in some very interesting cases. One of the earliest was the case of Wyman v. Wyman, in the 26th of New York, a case as well known to the students of insurance law as is the case of Jarndice v. Jarndice to the readers of Dickens. As it sets forth numerous and leading doctrines of insurance law I will quote from it quite fully.

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Wyman, the deceased, died in January, 1859, seized of a hotel building on which he had effected insurance to the extent of \$3,000. The policies ran to Wyman, his executors, administrators, or assigns. Wyman died wholly insolvent, leaving a widow, the plaintiff, who took out Letters of Administration, and two children, his heirs at law, who were the defendants. In October following Wyman's death the property was destroyed by fire. The Company adjusted the loss and made payment to the guardian of the infant heirs under a stipulation entered into by all the parties concerned that the guardian should hold the money subject to the direction of the court, the fund being claimed by the heirs, by the administratrix, and by certain creditors, who before the death had recovered judgment against the insured, which was a lien on the insured property for an amount exceeding its value. The decision of the court below was that the administratrix of Wyman was entitled to the money, and not the heirs at law. The guardian of the heirs appealed. The Court of Appeals said that while it was not required to determine whether an action could have been sustained against the insurance company by either of the parties named, yet the controversy between them could not be determined except by ascertaining the legal or equitable rights to the amount due under the policy.

The court said:

"Policies of insurance against fire are personal contracts with the insured. They are agreements to indemnify him against loss, and not guarantees of the immunity of the property insured. Such contracts do not attach to the realty, nor do they pass as incident to a conveyance or transfer of the title to lands. In the present instance, as ordinarily with us, in policies of insurance against fire, the contract is made with the assured, 'his executors, administrators and assigns.' Both by force of these words, and from the nature of the contract itself, the right of action upon the policy at the death of Wyman vested in his personal representatives. It is not easy to see how any one but his administratrix could have sustained actions on these policies which had been issued to Wyman, for any loss whether it had occurred before or after his death. It would have been a sufficient answer to any such action by the heirs, upon a policy of insurance, that it was a personal contract to which they were not parties, and that the right of action which it gave passed upon the death of the original assured to his legal representative, who not only succeeded to all his mere rights of action, but was specifically named in this contract itself."

The heirs contended that the administratrix could not have maintained an action because she had no interest in the property insured, and the court continued:

"It is unquestionable that the insured must have an insurable interest in the premises covered by the insurance at the time of the loss. But in the present case the title and interest in the lands, and with it the

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ownership of the building, pass to the heirs, yet as we have seen, the right of action upon the contract vested in the administratrix. These parties are not strangers to each other, however, but both of them derive title from the intestate by a devolution or transfer, which is not only not forbidden but is recognized by the policy. The policy does not avoid the contract upon the transfer of the title to the property by descent to the heir, and the devolution of the right of action to the administratrix, but expressly preserves the right of action and continues and extends the privileges of the agreement to the executors and administrators of the assured. An action may be brought upon the contract of insurance by the latter as the successor of the original party, and as named in the instrument itself, to recover damages for the destruction or injury of the interest of the former in the property insured. Thus the contract of insurance by the death of Wyman became by its terms a contract with his administratrix for the protection of the interest of his heirs. So that the right of action became vested in one person, while the interest in the property insured, which was requisite to sustain the action, belonged to another. The administratrix would thus have sustained her action upon the policy as a person with whom a contract is made for the benefit of another. She would have been regarded as a party to whom, as a trustee of an express trust, the right to sue in her own name is preserved under the Code."

"But it is difficult to reconcile the claim of the administratrix to hold this insurance money, as part of the personal assets of the deceased. The doctrine contended for by her counsel that not only the right of action, but the beneficial interest in the contract with the insurers, passed to the administratrix at the death of Wyman, fails when it is put to the test. She had no legal estate and no beneficial interest in the premises. The title to the contract, and to a recovery upon it, was vested in her by the operation of law, and not by express assignment or transfer. She is, of course, a trustee for creditors of the assets in her hands, but not of the lands of the deceased, nor of a contract like this, which is for the indemnity of those who have the beneficial interest in the lands. Upon the reason of the matter it is equally evident that the beneficial interest in such a contract of insurance belongs to the heir and not the personal representative of the deceased. The heir is the absolute owner of the property, entitled to its income and its enjoyment and damnified by its destruction. He only can bring an action for any damage done to it after the title has passed to him from his ancestor. If the destruction of this building by fire had been the result of the malice or carelessness of another, the heirs of Wyman would have had their action against such person and recovered damages for the very loss against which this contract is an indemnity. They could have destroyed, removed or sold the building at any time, and neither for such an act nor for any injury by a third person, could the administratrix have sued at all. Her rights rest upon the contract of the insurers exclusively; and that is a contract, as I have already said, not of guaranty against the destruction of the property, but of indemnity against a loss to the person injured by such destruction. It follows that it is a contract which, even if made or continued with her, is, in truth, for the benefit of the parties to whom that property belonged. The building which was burned was real estate. As such it vested in the heirs immediately upon the death of the intestate, and its subsequent injury by fire could not convert it into personal estate, so as to divest the right of the heirs or give a new direction or character to the money payable by way of indemnity for their loss. Again, it was a part of the contract of insurance in this case, as is usual in policies of insurance against fire, that upon the destruction or injury of the property the insurers, if they chose, might repair or restore it in specie. If they had elected to take that course the expenditure which would have been made would, of course, have been entirely for the benefit of the heirs. The building repaired or replaced would have been theirs,

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because standing upon their lands. The theory of the payment of money in lieu of such actual reparation, is that the party is thus enabled to replace what has been destroyed for himself instead of its being done by the insurers. This is very plain in the case of a partial loss where there is only an injury and not a destruction of the premises insured, but it is equally so in all cases. It would be a singular result if the election of the insurers could determine whether the heirs or the administratrix should take the benefits of their contracts; whether they would make compensation in money to the latter, or in kind to the former. And it is a strong implication from the existence of such a feature in the contract that its benefits must, in any event, and in either form of performance inure to those who would, in the case of its literal performance, reap its fruits."

So far the court considered the rights of the administratrix and the heirs and their rights as against each other, holding that the heirs were equitably entitled to the fund, but it appeared that there were other equities which had precedence over those of the heirs, namely, those of the creditors. There was a judgment against Wyman which was a lien against his real estate, and was held by persons not parties to the suit, and the court continued :

"Although this insurance money is to be treated as proceeds of real estate, it is nevertheless subject, as is the real estate itself under our laws, to the payment of the debts of the ancestor. * * * A court having control of such funds should not allow them to pass into the hands of irresponsible and infant heirs, leaving the creditors of the deceased to pursue them by the dilatory remedy of a new and distinct proceeding. Having possession of the fund it is proper to retain it for the purpose of a just administration among the parties entitled to it. It is usual in cases where the proceeds of real estate come into the hands of the court, and it is shown that there are debts which the real estate was liable to pay, or to be sold in the hands of the heir to satisfy, to order the money paid over to the personal representative (that is the administrator or executor, as the case may be), for distribution so far as may be necessary, holding him to account for any balance or resulting residue to the heirs."

The court held that the judgment below awarding the money to the administratrix, and not to the heirs, should be modified so as to provide for the satisfaction of the dower interests of the widow in the moneys in question; for the payment of the surplus to her as the administratrix, to be applied by her in satisfaction of the debts entitled to payment out of such assets in the order and manner established by law, and that the residue, if any, should be divided among the heirs at law of the deceased.

In the same year, 1863, the case of *Herkimer v. Rice*, 27 N. Y. 163, was decided. As in the *Wyman* case, a sum was paid into the hands of the surrogate, being proceeds of certain insurance policies on buildings formerly belonging to Rice, the deceased. *Herkimer*, one of the plaintiffs, and the administrator, was also a creditor, and claimed that the money should be distributed among

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the creditors. The defendants were five infants, the children and heirs-at-law of the deceased, and their general guardian, Tracy. Rice died in 1856 intestate, and seized of real estate on which there were buildings which had been insured against fire. The policies were in force at the time of the death, but expired early the following year. They were all renewed by the local agents by renewal receipts stating the premium to have been received from the estate of John Rice, deceased. At the expiration of the periods mentioned in these renewal receipts two of the policies were again renewed by receipts given by said agents, one of these last receipts running to the estate and the other to Tracy, who after the death of Rice obtained a new policy for \$1,000, in which George Herkimer, administrator of John Rice, deceased, was named as the insured. When this policy was about to expire it was renewed on the application of Tracy pursuant to instructions from Herkimer, the administrator, the receipt stating that the premium had been paid by Tracy. It was during the running of the last mentioned renewals in 1858 that the property was destroyed.

. It was found as a fact that the administrator had given the instructions for the renewal of the policies, and that they were renewed from time to time for the administrator. But Tracy during all these transactions was the general guardian of the infant heirs. The money which he had paid to obtain the renewals and for the premium on the additional policy was the money of the infant children in his hands as their guardian, and he charged the same in the accounts which he kept with them as such guardian. This guardian filed proofs as general guardian, claiming that the money belonged to the children. The companies paid him and took his receipt as general guardian, and he deposited the money in a bank to his credit as guardian, where it remained until turned over to the surrogate.

The Estate of Rice was insolvent, and it was believed by the administrator to be so when these renewals were arranged for. The administrator applied to the surrogate and obtained an order for the sale of all real estate, and the proceeds were applied to the payment of debts, leaving debts still unpaid to an amount exceeding the insurance moneys. The administrator applied to Tracy the guardian to pay the money over to the surrogate. This was eventually done, and the court below in this action held that the residue of the fund should be distributed to the creditors in the same man-

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ner as though the same were the proceeds of real estate sold under the order of the surrogate, and the infants and their guardian appealed. These were the facts.

The Appellate Court said:

"Counsel for administrator and creditors maintains that, though it should be considered that the contracts of insurance which were in force at the time of the loss were effected by, and were the property of, the heirs, the insurance moneys should still in consequence of the events which have happened, be applied toward the payment of the debts of the intestate. These moneys, it is argued, are a substitute for so much of the real estate as has been destroyed by the fire, and inasmuch as the whole real estate would have been chargeable with the debts if no accident had happened, the conversion of a part of it into money by that fortuitous circumstance ought not to exempt it from the charge to which the law had subjected it. This would plainly have been the result if the contract of indemnity had been made by the deceased in his life time as was held in *Wyman v. Wyman*. In that case the fire occurred before the expiration of the policy which had been effected by the deceased, and it was decided that the indemnity took the place of the real estate, and belonged to the heirs, subject to the charges which would have existed against it in their hands. But when the land vests in the heirs by the death of an ancestor they do not owe any duty to the creditors to insure the buildings against accidental injury from the elements, and if they do contract with others for an indemnity against such accidents, and pay the premium, and the contingency happens, the promised indemnity belongs to them, and not to the creditors who are strangers to the contract. If the defeasible nature of the estate of the heirs on account of the existence of debts owing by the ancestor were known to the insurers it is to be supposed that they would only insure a sum commensurate with the limited interest of the heirs. But whether the amount insured is so actually measured or not, the interest at risk for which the indemnity is promised, is their estate, and not that of parties holding paramount rights, capable of being enforced in such a manner as to divest the title of the heirs, and to create a title in some other person. By resorting to the statutory proceeding for a sale under a surrogate's order, as was actually done, the land must of course be sold in the condition in which it is found when the sale takes

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place, and a prior loss from an accidental fire must be borne by the creditors and not by the heirs, who had enjoyed it from the testator's death to the time of the sale."

"These conditions show that if the heirs insure, during the continuance of their title and enjoyment, the insurance is upon their interest and for their benefit solely, and that neither the creditors nor administrators who represent them, have any privity with or interest in the contract of insurance."

The court below assumed that the contracts of insurance were made by the heirs with the insurance companies, and that the administrator had no such insurable interest as would warrant a policy in his name for the benefit of the creditors. The Court of Appeals, however, after reviewing the facts relating to the renewals, held that the renewals were made not in the name of the heirs, or their guardian, but by the guardian as the agent of the administrator, and for the benefit of the estate, and the fact that the guardian had charged the premiums in his account as guardian was in no way controlling.

This case of *Herkimer v. Rice* is also interesting and important because it further established the propositions that not only the creditors of an insolvent estate had an insurable interest in the buildings, but that the administrator also had as their representative. The creditors had a pecuniary interest in the preservation of the building, and could in a proper case borrow upon it, have it leased or sold. The court said, "The law does not require that the assured should have an estate or a property in the subject of insurance. It is sufficient if he have a direct pecuniary interest in its preservation. Creditors have no other means of enforcing their debts, but having a direct and a certain right to subject the real estate to a sale for their benefit, have an interest as positive and absolute as one having a specific lien, or even as the owner himself." The court further intimated that if the creditors had insured, and had been compelled to sue the insurance companies, their recovery would no doubt have been limited to the amount of their debts, and if such suit had been brought before the sale of the lands the creditors might have been compelled to assign their demands to the insurers, in analogy to a case of a mortgagee effecting insurance upon the building covered by the mortgage. Some of the considerations which led the court to hold that administrators could insure were that it was wholly convenient that they should

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possess the power; that as they were the parties to whom the creditors must resort in the first instance they necessarily became accurately informed as to the amount of the indebtedness, and having also title to and possession of the personal assets they were first to know whether the real estate would have to be resorted to; that the creditors were generally numerous and had no opportunity of concerted action except through the executor or administrator and that under our statutes the executors or administrators have certain rights affecting the real property. While they have no power to sell the real estate without an order of the court, it is material to the value of the power and to the objects contemplated by the statutes that the estate should be protected from injury in the interim, and until the proceedings could be effected, and that where the value consists to any extent in combustible structures the known and universal method of obtaining such protection is by an insurance against the hazard of fire.

These two cases were decided in 1863 and are today leading cases on the points mentioned. They arose under policies running to the insured, his executors and administrators. Under the standard policy and the forms, as usually attached, the insured alone is named and the policy conditions provide that death shall not void the insurance, and that wherever the word "insured" appears it shall be held to mean the legal representatives of the insured.

In 1896 an action was brought to recover upon a standard policy of fire insurance issued to the decedent in his life time for a loss of certain real and personal property occurring after his death, and the Appellate Division said,

"The action was properly brought by the administrators of the deceased. They were his legal representatives within the meaning of the law. The company claimed that they were only his legal representatives as to the personalty, and that the heirs are his legal representatives as to the real estate. Upon this it contends that two actions should have been brought, one by the heirs for damage to the real estate and one by the plaintiffs for the damage to the personalty. This contention fails to distinguish between the right of action proper and the right to share in the recovery. If the policy had simply named the deceased and stopped there the right of action would have passed upon his death to his executor or administrator. The provision in the policy that wherever the word 'insured' occurs therein it shall be held to include the legal representatives of the insured, was nothing but a recognition of the ordinary rule. So far as the contracting parties were concerned there was no intention to vary the rule with regard to the vestment of the right of action upon the death of the insured. As between them the real estate incident was of no especial importance, and it was quite immaterial whether the loss in case of fire should be paid directly to the heirs or to the legal representatives (as ordinarily understood) in the right of

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the heirs. The contract as to both real estate and personalty was with Lawrence. The plaintiffs are his successors. As such the defendant's contract obligation runs to them directly. They could maintain the action because of this direct contract obligation. They so maintain it in their own right as to the personalty, in the right of the heirs as to the real estate, as was held in the Wyman case. They may be regarded, as was said in that case, as parties to whom as trustees of any express trust, the right to sue in their own name is preserved under the code. (Code of Civil Procedure 449). Thus the contract right and the insurable interest are interwoven.

"What equity may require the plaintiffs to do with the recovery is another question. The heirs can take care of themselves. What the company must do is to comply with its contract, namely, pay the loss to the persons to whom its legal obligation thereunder runs."

Lawrence v. Niagara Ins. Co., 2 App. Div., 267.

In this case the heir did not sue and it was held that action may be brought by personal representatives—the administrators.

In the same year, 1896, the very interesting case of *Matthews v. Ins. Co.*, was decided by the Appellate Division, 9 App. Div. 339. Interesting because, owing to a contest, the executor was not appointed until two years after the fire, and then proofs were filed and suit brought. In August, 1889, a policy in the standard form was issued to Mrs. S. insuring her dwelling, barn and produce for three years. In December, 1891, Mrs. S. died, leaving a will by which she devised her farm, on which the insured building stood, to her executor for five years, then to be sold and the avails, after the payment of debts, to be divided among her three children. Probate was opposed and in April, 1892, when the contest was still on before the surrogate, a fire occurred destroying part of both realty and personalty. In May, 1894, the contest over the will resulted in its admission to probate, and the appointment of plaintiff as executor. In July, 1894, two years after the fire, proofs were sworn to by the executor and mailed and received July 23rd, 1894, and retained without objection. Loss not having been paid suit was brought in October, 1894. The defenses were that the action was not begun within twelve months, that no immediate notice of loss was given, and that proofs were not served within sixty days. The Appellate Division held that there was no excuse for the delay in complying with policy conditions, saying,

"For although an executor may not maintain an action before letters testamentary are issued, yet he derives his title from the will and not from the letters, and he is empowered to do anything and everything for the protection of the estate before letters are issued. He possessed the power (and, if he intended to accept the trust and qualify, it was his duty) to have proceeded to furnish the proofs of loss, so as to preserve and protect the estate and the interests of creditors, legatees and all others whom he represented. Consequently there was no legal excuse for the omission to comply with this condition."

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"Again, it would seem that the devisee of the land, being the real party in interest—and if there is no deficiency of personal assets for satisfaction of creditors, the sole party in interest—would have the right to furnish proofs of loss, and the company would be bound to accept them. If the personal assets are ample for payment of debts the heir or devisee is entitled to the proceeds of the insurance policy; if insufficient, then he would be entitled to the surplus, if any, remaining after the payment of the debts."

In referring to the Wyman case the court said,

"It was not decided whether heir or devisee, as the real party (and perhaps the only party) in interest, could sue upon the policy." "It seems not," said the court.

Remember that in the Wyman case the policy ran to Wyman, his executors, administrators and assigns, while in the Matthews case, under a standard form, it ran to Mrs. S., and the words, "legal representatives" were by the Appellate Division seemingly held to exclude the heir in that case from the right to sue, though including him among those who might file a proof. In referring to the rights of the heir, the Court of Appeals, however, when the Matthews case came before it, 154 N. Y. 449, said,

"As the fire occurred after the death of Mrs. S. the insured at the date of the loss was either the person who in the course of time should be appointed by the surrogate to administer upon her estate, or the persons interested in her estate who expected to share therein."

"As legal representatives are equivalent to executors and administrators, where the subject matter or context do not control the meaning, we will first proceed upon the assumption that on the death of the testatrix the words "the insured" as used in the policy referred to the legal representative to be appointed by the surrogate."

The court then proceeded to show that there was no good reason for the failure of the executor to act and continued,

"Upon the assumption that the legal representatives of the insured referred to in the policy included the heirs at law, next of kin, legatees or devisees, as may be the case, the situation of the plaintiff is not improved, because according to that theory there was no time when competent persons sustaining one or more of those relations to the decedent could not have given the preliminary notice and furnished the proof of loss.

"Therefore, whether the policy means by legal representative the appointee of the surrogate or some person directly interested in the estate or both, there was a failure to comply with its provisions with no excuse for non-compliance."

Beach, in his work on insurance, says,

"The right of action on an insurance policy for the destruction of property after the death of the insured lies either in the heir or in the administrators." 2 Beach 1282.

The Indiana court said,

"There is some conflict in the authorities as to whether an administrator can sue on a policy of insurance on real estate issued to the decedent in cases where the property is burned after his death."

Pfister, Administrator, vs. Gerwig, 122 Ind. 567.

Black in his Law Dictionary defines "legal representatives" as follows:

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"Primarily the term meant those artificial representatives of a deceased person, the executor and administrator, who by law represent the deceased in distinction from the heirs, who were the 'natural' representatives. But * * * the phrase has lost much of its original distinctive force and is now used to describe either executor and administrator or children, descendants, next of kin or distributees."

Our Court of Appeals has also referred to these words as being "words of doubtful meaning" and the courts of many other states have referred to the phrase as being "an ambiguous term."

While the words "legal representatives" mean administrator or executor, they may refer to heirs or next of kin. *Davidson v. Jones*, 112 App. Div. 254 at 257.

While the strict technical meaning of the words "legal representatives" is administrators or executors, and they must be so construed in the absence of anything showing a different intent; as they are not always used in this sense, it is the province of construction in any case to ascertain the sense in which they were used, and for that purpose the subject matter and the surrounding circumstances, as well as the language used, may be considered. *Griswold v. Sawyer*, 125 N. Y. 411.

Our subject matter is the building. Assume that the insured dies and that his estate is solvent, not insolvent. The executor, in the absence of a provision in the will to the contrary—or if there be no will the administrator—has no interest in the building. The heir has the title; he is the owner and may go into immediate possession; he alone could sue the railroad company if it injured the property. Is he not in that case the real insured? If a fire occur he may file proofs, and is he not the one whom the company would desire to examine under oath? Is he not the one the company would desire to bind as owner by an appraisal, having been in possession since the death of the original insured? Is he not the one who could best file a proof satisfactory to the company? In other words, where the heir or devisee is the only party interested in the real estate is he not, after the death of the person to whom the policy was originally issued, the insured within the meaning of the policy, and should he not be allowed to sue in his own name? I think these questions should be answered in the affirmative.

Our Code of Civil Procedure provides (Section 449):

"Every action must be prosecuted in the name of the real party in interest, except that an executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue, without joining with him the person for whose benefit the action is prosecuted.

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A person with whom or in whose name a contract was made for the benefit of another, is a trustee of an express trust within the meaning of this section."

But while under this section an executor may sue without joining the beneficiaries, it does not forbid an action by them, or by him with them. *Hubbell v. Medbury*, 53 N. Y. 98.

This section of the code is permissive merely. The action may be by the trustee of the express trust. There is no prohibition against the real party in interest bringing it, or being joined as plaintiff. *Cassidy v. Sauer*, 114 App. Div. 673.

The question naturally arises, How should insurance be renewed where the policy on real estate expires after the death of the insured? This depends upon the interests sought to be protected. If the broker is acting for the heirs the insurance should be taken out in their names as owners, and it will not inure to the benefit of the creditors. If he is acting for the executors or administrators, the first question would be, what interest have they in the real estate? If they know at the time that the estate is solvent they have no interest, unless, for example, the will leaves the real estate in trust, in which event the insurance should run to the trustee. If it is doubtful whether the estate is solvent the policy may run to John Doe as executor or administrator, or if a more elastic term is desired insurance may be taken in the name of the "Estate of" John Doe. That term has been referred to by the Court of Appeals in the following language.

"It is an indeterminate word, the precise meaning of which is to be ascertained from the circumstances under which it is used. It may be used to represent the interest of administrators in the personal estate, or of the interest of widows and heirs in the real estate or in the interest of all these in both personal and real estate, and the scope to be given to it will depend largely upon the persons who procure the policy and the purpose for which it is procured."

Weed v. Insurance Co., 133 N. Y. 394.

From what has preceded it will be seen that the following general propositions may be stated:

1. That executors have no interest in the real property unless the will provides to the contrary or unless the personal property is insufficient to pay the debts and that administrators have no interest in the real property unless the personal property is insufficient to pay the debts.
2. That upon the death of one who has effected insurance on his house against fire, the interest in the policy devolves upon his heirs at law, and in case of loss the damages accrue to them, but the executors or administrators of the insured may maintain an action for those beneficially interested in the real estate; that the proceeds recovered in such action stand in the hands of the administrator or executor not as personal property, but as realty, subject to the dower of the widow and the lien of judgment creditors before distribution to the heirs.

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3. That an executor or administrator of an insolvent estate has an insurable interest in the real property.

4. That the rights of creditors to resort to the sale of the real property for the payment of debts gives them a sufficient insurable interest to support a contract of insurance, and when made by an administrator it is for their benefit so far as required to pay the debts. If the insurance moneys exceed the amount of the debts the administrator holds the proceeds in trust for the heirs.

5. That upon the death of the ancestor the heirs may insure for their own benefit, notwithstanding the defeasible nature of their estate in consequence of its liability to sale for the ancestor's debts.

6. That the words "legal representatives," as used in the standard policy refer to the executor or administrator unless the subject matter leads to a different conclusion.

7. That the heir as the real, and perhaps the only, party in interest, has the right to furnish proofs, and the insurance company would be bound to accept them.

8. That while the words "legal representatives" usually refer to executors or administrators, that term is sufficiently broad to include in a proper case heirs at law, next of kin, legatees or devisees.

In conclusion it is respectfully submitted that the facts may be such that an heir, after the death of the original insured, may become a substituted insured, entitled to file proofs, to agree on the amount of damage and to sue in his own name for the recovery of his loss.

XXXV
THE CO-INSURANCE CLAUSE

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The phrase "co-insurance clause" has two meanings, one general and one specific. The former applies in a general way to several different clauses intended to restrict the liability of an insurance company under a fire insurance policy to that proportion of the loss which its amount at risk bears to a given percentage of the value of the property at the time of the fire. Clauses designed to secure such result are of various wordings, some well and some poorly adapted to the common purpose. Each kind bears a name supposed to be descriptive; but, in a general way, all are referred to as co-insurance clauses. It is according to this general significance that the phrase is used in the title; and according to this significance we may use it until, later on, we undertake to distinguish the different kinds of clause. Thenceforward we shall use it only in its restricted sense.

In view of the admitted importance of the co-insurance clause, it would seem strange that so many of us fall short of its full comprehension, were it not for the peculiar ways in which it lends itself to the limitless combinations appearing in the apportionments of which it is a factor.

But one need not be discouraged by the seeming infinitude of its ramifications. Without actually exhausting the subject one may have a good working knowledge of it; and we may profitably study its elementary features.

There is, as many of us know, great opposition to the co-insurance clause in many parts of the country; some States seeking, apparently, to discourage its use by loading it down with inconveniences; some prohibiting it except in all but a limited class of cases; while some prohibit it altogether.

In view of this disfavor, why is its use not abandoned? The best reason assignable is that it is the only factor that will secure justice to all in the matter of rates. And many of us believe that in the fullness of time, every State, even those now prohibiting it, will permit and perhaps ordain its use. The realization of this

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belief will depend on the inherent justice of the principle involved. And it seems proper to consider its justice before we proceed to study its practical application.

Comprehension of the justice of the principle is more easily acquired than communicated to another; much more easily communicated to one with, than to one without practical experience in underwriting or the adjustment and apportionment of losses.

Many explanations have been formulated for the conversion of the average property-owner to the recognition of the necessity of the co-insurance clause for the maintenance of justice as between all policy-holders; but while they are sound and logical, the fact remains, as evidenced by the laws above referred to, hampering or preventing the use of the co-insurance clause, that all unwilling listeners have not yet been convinced.

I have noted carefully and with profit the remarks relative thereto contained in the paper read by Mr. E. G. Richards at the annual meeting in October, 1908, of the Fire Underwriters' Association of the Northwest; also that portion of the report transmitted to the legislature of the State of New York on February 1, 1911, by the Joint Committee of the Senate and Assembly of that State; generally known, I believe, as the "Merritt Committee." Each paper presents an argument that should convince any intelligent and fairminded legislature of the justice of the universal application of the principle of co-insurance. We may profitably consider both papers, and, not inappropriately in the order in which they were promulgated. It is interesting to note the different lines of thought along which the arguments run, as well as the harmony of their conclusions.

Mr. Richards views the principle involved as analogous to that of taxation. He refers to the necessity of uniformly just valuations of property as the basis of taxation.

All will admit that it would be both unjust and absurd to rely for purposes of taxation of real estate on valuations made by the owners, each for his own. All estimates would not be honestly made, and the dishonest would escape in great part the burdens of taxation, much of the burden properly accruing to them being transferred to those whose estimates approached more nearly to the proper standard.

Manifestly, therefore, just as the valuations for real estate taxation must be uniformly proportionate to actual values in order

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that each shall make his proper contribution to defray the cost of benefits expected, so should valuations for purposes of insurance be uniformly proportionate to actual or sound values so that each policyholder shall make his proper contribution to defray the cost of benefits expected.

Manifestly, also, he does not live up to this obligation unless he does one of two things:

(a) Purchase insurance to a proper percentage of the value of his property; or

(b) Accept a policy for a less sum which must provide that in event of loss he shall receive no greater sum as indemnity therefor than will be proportionate to the amount of insurance he holds on the property.

The provision first designed to accomplish this result under Fire Insurance policies was denominated the Co-insurance Clause, and made the insured a co-insurer to the extent of the deficit in the amount of his insurance as compared with the amount of insurance needed to conform to the proper standard. This will be considered in detail later.

Rates are, we understand, based on the supposition that property owners will protect themselves by insurance to 80 percent of the values of their respective properties. Therefore, 80 is designated as the percentage of value in the Co-insurance Clause to be attached to a policy issued at the rate, made, as above indicated, in contemplation of insurance to that extent.

Mr. Richards, it will be seen, deals with fundamental principles.

Of the Merritt Committee report, that portion relating to co-insurance deals with illustrations, based in part on statistics, showing among other things that the principle

on which the co-insurance clause is founded is not only sound but is absolutely requisite if the equities of the insured are to be preserved.

The Merritt Committee report contains a statement of the average 100 losses shown by statistics to occur to every \$100 worth of buildings of a certain class, the losses being divided into ten groups: the first group comprising those less than 10 percent of the values of the properties involved; the second, those exceeding 10 percent and less than 20 percent; and so on, 10 per cent at a step, the last group consisting of losses exceeding 90 percent. It goes on to show that

Every 100 fires burn altogether \$916 worth of property, supposing the properties in each case to have had a value of \$100.

These statistics not convenient of quotation here, show that if on each building just \$10 of insurance had been carried for every

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\$100 of value, the 100 losses would have cost the Companies \$344 (34.4 percent of the insurance) :

That if the insurance had been \$20 for each \$100 of value the cost to the companies would have been \$488 being 24.4% of the insurance.

If \$ 30, \$593, being 19.77% of the insurance;					
"	40,	673,	"	16.82%	" " "
"	50,	738,	"	14.76%	" " "
"	60,	793,	"	13.22%	" " "
"	70,	838,	"	11.97%	" " "
"	80,	873,	"	10.91%	" " "
"	90,	898,	"	9.98%	" " "
"	100,	916,	"	9 16%	" " "

We quote from the report:

The principle that is here established is that the rate in fire insurance must equitably depend not only upon the class of risk, but upon the percentage of insurance carried, and that for example a rate of ninety-three cents which might be right if 80 percent of insurance were carried would be much too low if only 30 percent were carried.

It clearly appears from the able arguments presented by these authorities that if rates are based on the assumption that insurance to a certain percentage of the value will be carried, the rate is right only where, in event of loss, the Company is called on to pay only that proportion of the loss which its policy bears to the percentage of the value contemplated in the rate, whether this limit on its paying power results from the amount of insurance carried or from the presence in the policy of the appropriate co-insurance clause.

If a policy written at a given rate must pay, up to its amount at risk, for any loss regardless of whether the percentage of insurance to value be large or small, one of two things is true; either the insured is overcharged if the percentage of insurance to value be high, or undercharged if it be low.

Because one who insures to a small percentage only of his value may suffer a large uncollectible loss if the percentage of loss be high, the extent of such inequity as between policyholders is somewhat restricted. But the best that can be said of this restraining influence is that its results are less unjust than would be those of a law granting to the property owner the right to demand at the rates current under present conditions, and *after the fire*, insurance to meet his needs as then developed.

Losses are not met by the premiums charged for the policies under which the losses occur. In life insurance every risk is expected to be a total loss sooner or later, and the rate charged is regulated accordingly. If in fire insurance the policies under which

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no claim is ever made were less than a great majority of the policies written, the rates charged would need to be increased many-fold. It is approximately true that losses are paid by the premiums on the policies under which no loss occurs—in fact the premiums on policies under which losses occur would not be anywhere near sufficient to pay the expense of conducting the business, to say nothing of losses—and unless there is some influence at work to keep the revenue from these policies at current rates up to a proper level, the receipts therefrom will fall so as to require the rates to be materially increased. This influence is only partially supplied by the fear of loss equal to or approaching the value of the property. It must in fairness to all—Companies and policyholders alike—be supplemented by some provision in the policy contract restricting the Company's liability for loss to that proportion thereof which its policy bears to the percentage of the value which was contemplated in the rate.

Now, I submit that the foregoing arguments should suffice to convince any well informed and fairminded body that, regardless of justice to the Insurance Companies, equity as between policyholders demands the application, to all policies, of the principle of co-insurance. But the fact remains that the Solons of several States have not yet seen the light. Bearing in mind that "fools rush in where angels fear to tread" a mere adjuster might well hesitate to attempt to supplement the able arguments already presented with any of his own. And yet, remembering that a straw, applied at the critical moment, has broken a camel's back, I venture to present, for consideration as a possible straw, an argument differing from, but consistent with those already noticed.

The great majority of fire losses are on property susceptible to any degree of loss, however large or however small. Some classes of property there are whose destructibility in event of fire is extreme. As an example, we may cite kerosene or gasoline in the simple form of tank with no provision for the removal to a place of safety of part of the contents. Almost if not quite as striking an illustration is hay in stack. Many classes of unprotected property are doomed to a total loss if fire occur.

On the other hand, there are classes of property which, owing to one cause or another, or to combinations of causes, are prolific in small losses and only in exceptional cases are subject to heavy or total loss.

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But in the great majority of cases the property (building or contents, or both) is of such a nature that neither an insured nor his insurer can reasonably pin his faith to any special percentage of loss in event of fire. And it is this great majority of cases to which our argument is directed.

As a foundation, let me state what I believe must be conceded to be a fundamental truth: That if two policies, each for the same amount, are issued on the same property, the first to cover till exhausted and without contribution from any other insurance, on any loss that the property may sustain, the other to apply to so much of the loss as exceeds the amount of the first policy, the first policy is equitably entitled to a higher rate than the second. This granted, let us assume that, as must often be the case, the difference in rate between two such policies, each for \$1,000 on property worth \$2,500, is one-third of the greater. That is to say, if, in such a case, 60 cents per \$100 is the proper rate for the first, 40 cents per \$100 will be the proper rate for the second, the premiums being \$6 and \$4 respectively.

Next, let us consider instead of these two policies a policy for their aggregate amount, \$2,000, so written as to cover till exhausted and without contribution from any other insurance on any loss that the property may sustain. This policy will yield in any conceivable case exactly the indemnity that would be yielded by the two \$1,000 policies previously considered; exactly that and no more. Therefore, it is worth exactly as much as should be charged for the two \$1,000 policies. The premium on the \$2,000 policy should therefore be \$10 and the rate, in consequence, 50 cents per \$100.

Let us apply first the two \$1,000 policies, and then the \$2,000 policy to a loss of \$1,500.

The first \$1,000 policy will pay \$1,000; the second will pay \$500.

On the other hand, the \$2,000 policy will pay \$1,500.

Suppose it were desirable to issue two policies for \$1,000 on the property in question each at the rate, 50 cents per \$100, that had been found to be equitable on the \$2,000 policy. In order for the rate to be as fair for each of the \$1,000 policies as it was for the \$2,000 policy, it is manifest that provision must be made whereby, just as the \$2,000 policy pays the whole of any loss not exceeding \$2,000, so each \$1,000 policy will pay one-half of any loss not exceeding \$2,000.

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It may be asked why it is necessary to make such provision, as each of the policies will pay its proportion (one-half) according to the contribution clause. The answer is that either policy may be canceled at any time, leaving the other the only insurance on the property. Without the special provision indicated as necessary, it would then have to pay the whole of any loss up to \$1,000 instead of one-half of any loss up to \$2,000. This would be inequitable as, for a 50 cent rate, it would be carrying all the burden of the underlying \$1,000 policy, for which the fair rate we know to be 60 cents.

Therefore, if the \$1,000 policy is to be sold at a 50 cent rate, it must be relieved of all burdens except those contemplated by that rate. This can only be done by a provision, however worded, whereby liability under the policy, which, of course, can never exceed its amount at risk, is limited to that proportion of the loss which its amount at risk bears to 80 percent of \$2,500, the value of the property.

In presenting the above argument, we have considered policies for 40 percent and 80 percent respectively of the sound value of the subject of insurance; it has been assumed that the proper rate for the underlying policy was 60 cents, and that for a 40 percent excess policy 40 cents; and we have seen how it followed that, in these circumstances, the proper rate for an ordinary policy subject to the 80 percent clause was 50 cents. But these particular factors were taken merely for convenience. The argument will hold good though other percentages of value be substituted for 40 percent and 80 percent and though other rates be assumed than 60 cents per \$100 and 40 cents per \$100. The conclusion will always be that, as to property susceptible of any degree of loss, large or small, the lower the percentage in the co-insurance clause, the higher must be the rate.

To sum up the arguments in favor of the co-insurance clause:

In any State that forbids its use, the rate for insurance being based entirely on the comparative hazard of the risk, one of two things *must* happen while both *may* happen; either the property owner who takes out insurance for 80 percent or more of the value of his property will pay too high a rate, or the one who insures against loss on the same class of property for a smaller percentage of its value will obtain it at too low a rate. Let not the State delude itself into the belief that it is not concerned if one of its citi-

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zens obtains something for nothing or for a sum less than cost. Nothing can be truer than the "the consumer, he pays the tax," later if not sooner.

The States that are so opposed to the co-insurance clause are noticeably apt to favor anti-discrimination laws in the matter of rates.

But as one kind of discrimination in the cost of insurance is as unfair as another, let us consider whether discrimination is inhibited by statutes which provide that rates must be proportioned to the comparative liabilities of various properties to loss by fire, while, at the same time, they forbid the use of co-insurance or average clauses.

If 1 percent is the proper flat rate for A's property, and the hazard of B's property to that of A's is as 5 is to 4, B's property must be rated at $1\frac{1}{4}$ percent flat. Now, according to the anti-discrimination statute, it would be reprehensible for an insurance company to issue a policy on B's property at a rate less than $1\frac{1}{4}$ percent, yet if B because of the greater hazard of his property, deems it prudent to maintain insurance up to 80 percent of his value while A insures up to 40 percent only of his value, B's insurance involves a less risk to the insurers and, to avoid discrimination, should bear a rate lower than A's rate; yet under the so-called "anti-discrimination law," B must not be permitted to obtain his insurance at a rate less than $1\frac{1}{4}$ percent, no matter how much he may decrease the risk to the insurer by increasing its amount.

To one who is influenced by the arguments we have considered, this seems as great a discrimination against B as it would be if policies to 80 percent of the value on property of like hazard to that of his were issued at the rate of 1 percent, while the charge to him therefor remained at the $1\frac{1}{4}$ percent rate.

It is to be hoped that a realization by those opposed to discrimination, that the prohibition of co-insurance produces rather than prevents it, will lead to the abolition of discrimination, so far as possible, in the only known (or conceivable) way, viz.: Proper adjustment of rates, based in each case upon some assured percentage of insurance to value, and the requirement of a co-insurance clause based upon the same percentage of insurance to value.

Let us pass now to the consideration of the operation of the clause:

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As has already been called to your attention, the phrase "co-insurance clause," in the foregoing portions of this paper, has been held to include not only the co-insurance clause proper, but also other clauses, differing in form but likewise denominated co-insurance clauses and still other forms of clause known as the "reduced rate average clause," or, as in New York City, the "average clause."

A careful analysis of the various forms of clause in use throughout the United States shows that they may be properly analyzed as follows:

First: The co-insurance clause proper providing, with little, if any, variation, that the insured shall maintain insurance upon the property hereby insured to the extent of at least percent of the actual cash value at the time of the fire, and failing so to do, shall, to the extent of such deficit, bear his, her, or their proportion of any loss.

Second: The percentage co-insurance clause, reading substantially as follows:

If at the time of fire the whole amount of insurance on the property covered by this policy shall be less than percent of the actual cash value thereof, this Company shall in case of loss or damage be liable for only such portion of such loss or damage as the amount insured by this policy shall bear to the said percent of the actual cash value of such property.

This, as will later appear, was a long step in the right direction. It is a reasonable guess that the author or authors thereof supposed that it did away with the inequities (iniquities) of the Co-insurance Clause, by giving the insurer the benefit of what we now know as the Average Clause, whenever, by reason of insufficient insurance, the benefit was needed.

Third: The average clause, reading substantially as follows:

This Company shall not be liable for a greater proportion of any loss or damage to the property herein described than the sum hereby insured bears to percent of the actual cash value of said property at the time such loss shall happen.

Fourth: The reduced rate clause, reading substantially as follows:

In consideration of the reduced rate at which this policy is written, it is expressly stipulated and made a condition of the contract that, in event of loss, this Company shall be liable for no greater proportion thereof than the amount hereby insured bears to percent of the actual cash value of the property described herein at the time this loss shall happen, nor for more than the proportion which this policy bears to the total insurance thereon.

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It will be seen that this clause is substantially the same as the average clause, except for the fact that a consideration for its incorporation in the policy is expressed, the consideration being the reduced rate at which the policy is written.

In the foregoing quotations I have included only the principal paragraph of each clause. Combined with each is usually found a provision restricting, to some extent, the application of the clause to losses less than 5 percent of the insurance, or value; and frequently also another making the clause apply specifically to each item of a multiple item policy.

The original form of co-insurance clause, at least so far as the writer knows, was that first above set forth.

This, so far as I recall, worked very well for a time. Sooner or later it was discovered that the owner of a plant comprising subjects of insurance of different degrees of fire hazard and, consequently, differently rated, could circumvent the clause. As an illustration, suppose a manufacturing plant, of the value, in the aggregate, of \$100,000, a part, valued at \$50,000, being rated at 1 percent, the remainder being rated at 2 percent. Instead of taking \$80,000 insurance in concurrent policies, each covering the entire plant subject to the 80 percent clause at the average rate of the entire plant, 1½ percent, premium \$1,200, he would obtain \$50,000 of insurance blanket over the whole plant at the average rate of 1½ percent, premium \$750; and \$30,000 of insurance covering specifically, subject to the 80 percent clause, on the low-rated portion of the risk at 1 percent, premium \$300; total premium, \$1,050 instead of \$1,200, thus saving \$150, 12½ percent of the premium he would have had to pay had he taken it all at the 1½ percent rate covering blanket over the whole plant, as the companies issuing the blanket policies supposed him to be doing.

In event of loss on the low-rated item, the assured would properly collect his entire loss as it would be covered by both sets of policies.

If, however, the loss occurred, wholly or in part, on the high-rated risk covered by the blanket policies only, the claim would be made that the blanket policies must pay the entire loss on the high-rated risk. The Company could not claim contribution as to the loss on the high-rated risk from the other insurance, as such loss was not covered by the other insurance, and was denied any benefit from the co-insurance clause, because of the contention that

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the insured had insurance (not on the whole property, it is true, but at least on a portion of it) to the stipulated percentage of the combined value of both items of property.

It was probably to avoid some of the troubles caused by such non-concurrences as we have considered, that the second clause above set forth was formulated.

This clause does, in many cases, secure the results intended for it; and, as will hereafter appear, I am disposed to believe that the courts should construe it in all cases as meaning the same as the average clause with which we New Yorkers are so familiar, and which we shall consider later. But it has been so construed by loss claimants and their representatives as to nullify the intention of the drafters in cases where, with non-concurrent insurance, and loss on that portion of the property covered only by the broadest policies, some of the insurance covering on all of the property and all of the insurance covering on some of the property, the aggregate being not less than the percentage of value stipulated in the clause, the insured has insisted that the conditions of the clause have been complied with, so that the restriction on the Company's liability could not be invoked.

Some adjusters have conceded in the past, and some still concede the force of this argument. As I view the clause, these adjusters have been misguided or too timid. I do know that one illustrious member of this society, when apportioning an adjusted loss under policies so written, carried his point and enforced a very heavy contribution by the assured by arguing in behalf of the blanket policies, which alone covered the property damaged, substantially as follows:

If you have insurance to 80 percent of the value of the property covered by the blanket policies each of these policies will, by virtue of its contribution clause, pay that proportion only of the loss which the amount insured under said policy bears to the total insurance. If your insurance is, in all, less than 80 percent of the value of the property, each blanket policy will, by virtue of the 80 percent clause, pay that proportion of the loss which the amount insured by said policy bears to 80 percent of the value of the property covered by the policy.

To my mind, the absurdity of any other construction than that successfully defended by our mutual friend can be clearly exhibited by comparing the results of two hypothetical but easily possible cases. In each there are two items of property, A and B. In the first case the factors are as follows:

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	A	B
Sound value	\$100,000	\$100,000
Insurance	60,000	
Subject to 80% cl. (blanket insurance)	\$100,000	
Loss		\$100,000

According to the assured's construction which, for the sake of illustration, we follow, the blanket policies would pay the entire loss, \$100,000, because the aggregate of the non-concurrent policies is \$160,000, being 80 percent of the value of the property covered by the blanket policies which alone, let me repeat, cover the damaged property.

Now, for our second case, let us assume that the factors are the same as in the first except that the sound value of A is increased \$1.00. The problem then appears thus:

	A	B
Sound value	\$100,001	\$100,000
Insurance	60,000	
Subject to 80% cl. (blanket insurance)	\$100,000	
Loss		\$100,000

The only insurance covering B is the blanket insurance of \$100,000.

The total sound value is \$200,001; the total insurance is \$160,000—less than 80 percent. Therefore, according to the 80 percent clause the blanket policies are liable for no greater proportion of the loss than that which their amount, \$100,000, bears to 80 percent (\$160,000.80) of the sound value of the property; the result being that the blanket policies pay \$62,499.69. The increase of \$1.00 in the sound value, every other factor remaining the same, reduces the collectible loss \$37,500.31.

Anyone who wishes to believe that a change of \$1.00 in sound value can effect a change of over \$37,500 in collectible loss is, under the constitution of the United States, guaranteed the right so to do. But he must not expect us all to agree with him.

So far as I know, only one court of last resort has decided a case arising under this clause where the insured had blanket insurance on two items of property with specific insurance on one only, the amounts at risk under the two sets of policies aggregating as much as, or more than the stipulated percentage of the value of both items, the loss being confined to the item covered by the blanket insurance only. The court in its decision held that the clause did not reduce the loss collectible under the blanket policies because the total insurance equaled the percentage of value named in the

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clause. It should be said in explanation that the contest in this case involved the question of whether all policies covered blanket on two items of property or whether part were confined in their cover to the undamaged item only.

It appears to have been conceded by the adjusters and other company representatives that, however the question might be decided by the courts, the insured would recover full indemnity. In consequence, when the attorneys for the blanket policy companies came to prepare their pleadings, they found themselves precluded from the following contention; that either there was or was not insurance on the property (both items) to the percentage of value named in the clause; that if there was, the blanket policy companies should pay only such proportion of the loss as their amounts bore to the total insurance; whereas, if there was not, they should pay, only that proportion of the loss which their amounts bore to the stipulated percentage of the value. The point not being contested, the court, holding that part only of the policies covered on the item involved in the loss, naturally held also that they must pay the entire loss.

Probably it was long ago recognized that while the clause, we have been discussing might, if tested, stand the strain, it was nevertheless, variously construed even by company representatives. And it is reasonable to suppose that the clause so long in use in New York City and other parts of the country and known here as the "Average Clause" was formulated for the elimination of all doubt and discussion. It read as follows:

This Company shall not be liable for a greater proportion of any loss or damage to the property described herein than the sum hereby insured bear to.....per centum(.....%) of the actual cash value of said property at the time such loss shall happen. In case of claim for loss on the property described herein not exceeding five percent (5%) of the maximum amount named in the policies written thereon and in force at the time such loss shall happen, no special inventory or appraisalment of the undamaged property shall be required. If the insurance under this policy be divided into two or more items, these clauses shall apply to each item separately.

To those familiar with it, this clause is free from ambiguity or doubt in so far as may be involved its restricting the liability of a company, in any conceivable case, to that proportion of the loss which its policy bears to the stipulated percentage of the value of the property at the time when such loss shall occur. Any doubt they may have as to its effect arises when it is to be construed, in cases of non-concurrence, in connection with the contribution

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clause. The apportionment of loss under non-concurrent policies is an interesting theme, but it has been assigned to another, so I leave it untouched.

Even so, the average clause affords room for discussion. It is customarily met either as the 80 percent or 100 percent average clause. It is surprising how many people, even some actively engaged in the insurance business, consider these clauses as if the effect of the 80 percent clause was to restrict the insured's collection, in event of loss, to 80 percent of the loss sustained, while the policy with the 100 percent clause permits the collection of the entire loss. This is, of course, amusing to one familiar with the subject. But what are we to do about it?

It is very easy to tell our misguided friend that his conception of the Average Clause is radically—fundamentally—wrong. But how are we to make clear to him its real meaning and the results of its proper application? Or rather, perhaps, how are we to arrive for ourselves at a clear understanding of the real meaning of the clause and the results of its proper application, so that the knowledge may be imparted to him?

Very simply if we have digested that part of the arithmetic devoted to common or vulgar fractions. The restrictive effect of the clause is measured by a fraction of which the numerator is, in every case, the product of the amount in dollars of the loss and the number of dollars in the amount at risk under the policy; the denominator varying according to circumstances.

(a) If neither loss nor insurance exceeds the stipulated percentage of value, the number of dollars in the percentage of value is the denominator.

Thus, if, in a given case the factors are:

Loss	\$5,000
Insurance	2,000
Average Clause	80%
Sound Value	10,000

the fraction will be

$$\frac{\$5,000 \times 2,000}{8,000} = \$1,250 = 25\% \text{ of the loss}$$

Had the clause designated 100 instead of 80 as the percentage, the fraction would have been

$$\frac{\$5,000 \times 2,000}{10,000} = \$1,000 = 20\% \text{ of the loss.}$$

(b) If the loss but not the insurance equals or exceeds the stipulated percentage, the denominator is the number of dollars in

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the loss, the equivalent of the fraction being the amount at risk

Thus, if, in a given case the factors are:

Loss	\$9,000
Insurance	2,000
Average Clause	80%
Sound Value	10,000

the fraction will be

$$\frac{\$9,000 \times 2,000}{9,000} = \$2,000 = 100\% \text{ of the ins.}$$

Had the clause designated 100 instead of 80 as the percentage, the fraction would have been.

$$\frac{\$9,000 \times 2,000}{10,000} = \$1,800 = 90\% \text{ of the loss.}$$

Of if the factors are:

Loss	\$11,000
Insurance	2,000
Average Clause	80%
Sound Value	11,000

the fraction will be

$$\frac{\$11,000 \times 2,000}{11,000} = \$2,000 = 100\% \text{ of the ins.}$$

Had the clause designated 100 instead of 80 as the percentage the case would be in class B, as the loss reached the stipulated percentage.

(c) If the insurance equals or exceeds the stipulated percentage, the denominator is the number of dollars in the amount at risk, the equivalent of the fraction being the amount of loss.

My recommendation to the student is that he construct for himself a series of different combinations of loss, insurance and sound value, applying to each the 100 percent and the 80 percent average clauses, each combination thus yielding two problems. Let him assume that any man is fallible and that my generalities, so confidently stated, may not be universally true and that it is his duty to find the lurking error. Let him preserve his notes so that when he has enough solutions he may compare them and see for himself how the average clause adapts itself to varying conditions and with what results. The adjuster or the proof-checker finds his examples ready-made for him among the apportionments that he must make or verify.

Probably a small percentage only of brokers, active in the prosecution of the Fire Insurance business, need the exposition of

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the Average Clause above given. But experience and observation lead me to believe that many could profit by a warning with regard to one phase of the subject.

The average clause, as has been sufficiently argued, is essential to the proper conduct of the business. Non-concurrent insurance, while troublesome to him who has to apportion losses thereunder, cannot by itself be considered in any way reprehensible. But the combination of the two is dangerous and should be consistently avoided by every broker and policy holder.

If all policies on a risk cover on exactly the same property, it is proper to say that if the insurance equals or exceeds the percentage of value stipulated in the average clause, the assured, in event of a loss not exceeding the insurance, will, so far as relates only to the average clause and the contribution clause in the body of the policy, be fully indemnified. It is not every broker who knows this; and of the many who do there are some who misapply the knowledge.

Any adjuster in active practice here in New York City may occasionally find that an assured has non-concurrent policies, each subject to the average clause, the aggregate of the amounts at risk equalling or even exceeding the stipulated percentage of value, but with the values and non-concurrences so distributed that the aggregates of the average clause limitations of the several policies, although the maximum of possible collectibility, is insufficient to indemnify the assured.

A notable, but not solitary, instance of this kind came to light some years ago in connection with a Committee loss, interesting especially, both then and now, because of the manner in which the non-concurrence arose. At first glance the policies seemed to cover alike on merchandise in two buildings. After the fire, however, it was discovered that a majority only of the policies were subject, as required by the rules of the Exchange, to the average distribution clause as between the two buildings. The apportionment of the loss agreed to by insurers and insured as correct, particularly as to the application of the average clause feature of the several policies, developed an uncollectible loss of some thousands of dollars.

Dry the starting tear. The deficit was supplied by *ex gratia* payments by some of the companies. These seemed justified by the

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high character of the assured, their fairness in the adjustment of the loss, and the elusive way in which the error had escaped attention.

Far be from me to deprecate the exercise of the act of grace in special circumstances. But neither the broker nor the insured should count on it when the contract is made. Indemnity for the loss is, I am sure, most pleasing to the broker's customer when it is paid in discharge of an obligation legally incurred for value received.

While there are brokers who scrutinize their policies so carefully that when delivered they are free from material errors, there is room in which others, younger and less experienced let us hope, may improve themselves.

But there is one factor for mischief that all a broker's care and foresight cannot always counteract. I refer to the claimant who has two brokers and letteth not his right hand broker know what his left hand broker doeth. What this kind of assured cannot achieve in the way of snarling things up for the broker chosen to represent him, also for the adjusters for the Companies, is hardly worthy of extended notice in a paper of this kind. As for what the adjusters think of him—well—let it go at that.

Another practice has the sanction of such long standing and, seemingly, at least, the approval of so many excellent authorities that one may not hopefully venture its condemnation. Yet it has in some cases resulted unprofitably for the insured and may reasonably be expected to do so again. I refer to the practice of having insurance, subject to the average clause, cover on the property of the assured and, as well, that of others, generally by incorporating the commission clause in the policy.

The commission clause has caused embarrassment and loss to the assured where there was no average clause. The probability of embarrassment to him is even greater with it.

Mrs. Johnson sent her victoria to the shop of the Chas. Abresch Company to be painted. The Abresch Company, so far as disclosed by the record, assumed no liability for damage to the victoria except such as, in the absence of any express contract, accrued to it in event of loss or damage to the victoria as the result of its negligence or that of its employes. Fire in no way the result of any negligence of theirs, damaged or destroyed property of the Abresch Company and, as well (or ill), the victoria belonging to Mrs. Johnson. The

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Abresch Company collected the face of its insurance, supposedly for the loss to its own property. There is nothing in the record to suggest that it was overpaid thereon. Mrs. Johnson had not obtained insurance to protect her against loss on the victoria. She would have had no recourse against the Abresch Company had it had no insurance covering on her property. But she learned that the Abresch Company's policy covered not only the Abresch Company's property but also that held by it on storage or for repair. She accordingly demanded of the Abresch Company a share of the money paid by its insurer. The Abresch Company refusing, she sued it. The case was appealed to the highest court of the State (Wisconsin), which decided that Mrs. Johnson should share in the money in the proportion that the value of her property bore to the combined value of her property and that of the Abresch Company.

My friend, James E. Underhill, now deceased, was known to many of you as proprietor of a picture and picture framing establishment at the corner of Nassau and John Streets. He had a valuable stock of his own. He also had in his possession on storage, framed pictures and other valuable property belonging to others. He also had pictures and other articles left with him to be framed. His policies covered his own property and that of his customers. Both were damaged by fire originating in a part of the building not occupied by him.

Sound value of his own property and the loss thereon were readily ascertained, but proofs could not be made or approved till the value of and loss on customers' goods were also ascertained. Some of his customers were wholly reasonable. All were not. The adjustment was a trouble to him in spite of all that could be done by him and the Companies' adjuster, although they were in perfect accord. As a result of this experience he wisely decided that thereafter his own property should be covered by itself under one set of policies, while the property of customers should be covered by another set from whose protection his own property was, by specific agreement in the policies, excluded.

The Abresch-Johnson case was not a New York case, but there is no certainty that the decision would have been any different here. The Utica Canning Company decision, so well known that quotation is not necessary at this time, inflicted no uncollectible loss on the assured, Louis DeGroff & Son, as there was enough insur-

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ance to cover the loss to both concerns. But suppose the insurance held by the DeGroffs, subject to the Average and Commission Clauses, had been insufficient or barely sufficient to indemnify them for their own loss; what would have been the result? Do the Abresch decision and the Utica Canning Company decision read together, indicate anything but danger to the interests of the party who takes out and pays for insurance subject to the Commission Clause supposedly for his own protection first?

This is a danger that the Insurance Companies are powerless to avert. Policies subject to both Average and Commission Clauses are desirable for some people in some circumstances. The Companies are in no position to decide whether such a policy does or does not fit the assured's needs. The decision can only be made properly by the assured, and by him only after his broker has explained to him the danger of taking insurance covering blanket both on his and on his customers' goods.

I will close my paper with two things for you to reflect upon: a question and a suggestion. The question is this:

Assuming property of a Sound Value of \$10,000, an insurance policy thereon subject to the 100% Average Clause, and a loss. What is the amount of the policy and what is the amount of the loss that, because of the Average Clause, will yield the greatest uncollectible loss?

The suggestion is this:

As the average clause is current wherever in New York State any clause coming within the general meaning of "co-insurance clause" is used, and as it involves no mathematics save "ratio and proportion," let the Board of Regents of the State prescribe it as one of the problems to be understood by the teachers of arithmetic and taught to all their pupils. This would be easily done, and when the children begin to understand the Average Clause, they will in many cases impart their knowledge to their parents. And in time the public, through this educational process will realize not only the absolute necessity of applying the principle of co-insurance, if the insurance burden is to be equitably apportioned among the property owners of the country, but will wonder why so self-evident a proposition should at any time have been regarded as even debatable.

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XXXVI THE COMMISSION CLAUSE

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For many years it has been the practice in writing insurance upon various kinds of merchandise, to cover not only the property which the assured may actually own but to include that of others in his possession or under his control, and in such cases there is embodied in the form, certain wording which has come to be known in our business as the "Commission Clause." Its use in recent years, in the larger centers at least (except as to stocks of small value and indeed as to many of these) has become the custom and rule. The agent or broker who, in these days, writes or accepts policies on merchandise without the Commission Clause, would very likely be looked upon as lacking proper training for his chosen vocation or that there was "sand in his sugar."

We are to comment in this paper upon the words "held in trust or on commission or sold but not delivered or removed," otherwise known as the "Commission Clause." We shall speak more particularly, in fact almost entirely, of the words "held in trust or on commission." The balance of the phrase, "sold but not delivered or removed," has no special significance in present day underwriting, it being recognized that a sale, unaccompanied by delivery, is incomplete and no violation of the policy, and if there has been a legal delivery (and consequently a change in ownership) but no removal, the property, in the absence of an agreement to the contrary, would be covered as "held in trust." The words "sold but not delivered" when used in connection with "held in trust or on commission," actually add nothing to the coverage of the policy.

And likewise I think we may say that had the originator, or originators (may his or their souls rest in peace) been able to estimate the extent to which their work was destined to be broadened by successive judicial review, they would have also discarded the words "on commission" and contented themselves with "held in trust," in which event their posterity would never have heard of a "Commission Clause," but it might have come down to us as the "Trust or Bailee Clause," certainly a more appropriate description of its scope and function.

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This paper is intended to be instructive rather than entertaining, which shall be my excuse for some detail at this time as to the meaning in law, and as used in the insurance contract, of certain of the words in which we shall be interested.

A *trustee*, in the legal and technical sense, is one who holds the legal title to property for the use and benefit of another. There are several kinds of trusts recognized in the law, the details of which are not necessary to this discussion, but a feature to be remembered is that a trust—in the legal and technical sense—can only be created by the intent of the person creating or declaring it, expressed either directly or by such language, conduct, facts or circumstances as will imply, or justify the Court in inferring, that it was the intention to create a trust; two elements to establish a trusteeship in the legal and technical sense; viz: the trustee holds the title and there must be the intent to create or establish a trust.

Now that is a legal trust; if that, and no more, is what is meant by "held in trust" as used in the fire insurance contract, it will be apparent to all of us that there could be few claims under the Commission Clause, for the reason that it rarely happens that the assured, the custodian of the goods, actually holds the title, but our Courts long ago declared that the words were not to be misconstrued in their technical sense, but will include any property which has been placed in the care, custody, possession or control of the assured. In one of the early cases in this country, *Stillwell v. Staples* (19 N. Y. 40) the Court of Appeals of the State of New York so ruled in a decision handed down in 1859, and in the following language defined its view of the meaning of the words "held in trust," viz:—

• The words "in trust" may with entire propriety, be applied to any case of bailment, where goods belonging to one person are entrusted to the custody and care of another, and for which the trustee is responsible to the owner.

In the next ten or twelve years the same question was again passed upon by the New York Court of Appeals in at least two cases (in 1867 in *Lee v. Adsit*, 37, N. Y. 78, and in 1871 in *Waring v. Indemnity Fire*, 45 N. Y. 606), as well as by other States, always with the same result; and in 1876 the question came before the Supreme Court of the United States, in *Baltimore Warehouse Company v. Home* (93 U. S. 593), and it was there held that the term "held in trust" was to be taken in a "mercantile" sense, meaning goods which had been entrusted to or deposited with the ware-

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house company. Our Courts have continued in the intervening forty years, whenever the question has come before them, to re-iterate the principle thus laid down by the earlier cases, and it is the law.

In cases of a trusteeship of the strictly legal kind, it is almost invariably the custom, as it should be, for the Trustee to insure the trust property in his own name as Trustee, thus keeping it separate from any property of his own individual ownership. Instances do occur, it is true, where the custodian holding the title as trustee, claims the loss under the Commission Clause (and in those circumstances, he is within his rights), but in my own experience of ten years in this vicinity, I think I may say such cases, in which I have been interested, may be counted upon the fingers of my two hands.

It will be noted from the foregoing, that as a matter of fact in practically every case of "held in trust," the custodian is not a Trustee at all but a Bailee. A *Bailee* is one who for some purpose or object, has been placed in possession of personal property owned by another, the same property to be returned or delivered when the purpose has been carried out. In the case of bailment, (and herein lies the difference between a trustee and a bailee), the title is not transferred but the bailee is simply the temporary holder and is to restore, or deliver, the identical property in the same or altered form. His obligations to the bailor vary with regard to the circumstances under which the property came into his possession. If he is holding it for the sole benefit of the bailor, as in the case of property on storage for which no storage charge is to be paid, slight care only can be exacted, in fact, practically anything will suffice, short of wilful negligence or intentional misuse: if, on the other hand, the bailment exists for the sole benefit of the bailee, as in the case of the gratuitous loan of some article, he must exercise the greatest care and is liable for even slight negligence, and if he holds the property for the benefit of both parties, as in the case of articles left for repair for which a charge is being made, ordinary precaution must be observed, in other words, reasonable care. In no case is the bailee obligated in the absence of a special agreement, to provide insurance for the benefit of the owner.

As we have seen, certain duties are by law imposed upon the bailee and in the event of the destruction of the property by fire,

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the circumstances may be such as to render him liable to the owner for the damage sustained, but it is equally true that he may not be liable for any of it; in fact, unless the owner can establish culpability or the requisite degree of negligence, the law holds him harmless, and the loss falls not upon the bailee, but upon the bailor.

We do not undertake to say at what stage of the development of the insurance business the Commission Clause was introduced, but suggest that as each individual came to recognize the necessity of protection from loss by fire upon his own property, he must also have realized its need as to such loss as might accrue to him with regard to the property of others in his possession, and I can well imagine that the use of something akin to our present-day Commission Clause has obtained in our business from the cradle up.

Be that as it may, I have no doubt that the purpose of the clause, as originally conceived, and the only purpose intended to be served thereby, was simply to extend the protection afforded the assured, to include such loss as *he* might sustain, in the event of a damage by fire, to the property of others in his custody. But the Courts have placed a different construction upon it, and the Commission Clause as now construed will cover the merchandise itself and not merely the assured's interest therein or liability thereon.

A leading authority in this country is the Baltimore Warehouse case, already referred to, and in any review of the question we are discussing, that decision must have a large place. There are gentlemen present, no doubt, who can recite it backward, and they will not be greatly interested in what is just before us, but we younger people, and I count myself one of you, will find in the details of that case much that will help us to a fuller understanding of this question.

The fire occurred in July, 1870. The Baltimore Warehouse Co., as warehousemen, held a large amount of property on storage for various people, including 676 bales of cotton for Hough, Clendening & Co., valued at \$52,863. The warehouse company had advanced \$48,720 to the owners, for which they held a lien on the cotton and they also held as collateral security, policies aggregating \$60,400, which the owners had secured in their own name, each policy covering a specific lot of the cotton, and all with Loss Payable Clause in favor of the Baltimore Warehouse Co.

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The Warehouse Company had previously taken out insurance in its own name and at its own expense under the following form:

On merchandise, hazardous, extra hazardous, their own or held by them in trust or in which they have an interest or liability.

Hough, Clendening & Co. knew nothing whatever of the existence of the latter insurance, had contributed nothing to its cost, but on the contrary, had insured the property in their own name in other Companies, but certain of their Companies took the position that by reason of the fact that the policies were payable to the Baltimore Warehouse Company, both sets of policies covered the same interest and must contribute. In due course, a suit was brought by Hough, Clendening & Co. in the Maryland Courts against one or more of their insurers, resulting in a decision in 1872 by the Court of Appeals of that State sustaining the contention of the owners' insurers (*Hough, Clendening & Co. v. Peoples Ins. Co.* 36 Md. 398). In the meantime, the Warehouse Company had settled with their insurers as to all items not in dispute, but had declined to execute final receipts and when the decision of the Maryland Court of Appeals came down, the Warehouse people demanded a further payment from their insurers, which was declined, and the case was again litigated, this time in the Federal Court, and the final adjudication by the Supreme Court of the United States was handed down at the October term, 1876. The insurers contended that they had not insured the cotton, but the Warehouse Company against any loss by fire which it might sustain upon the cotton; that there was no liability as Bailee; that they (the Warehouse Company) had not agreed to insure the goods for the owners, but on the contrary, each warehouse receipt bore a printed notice across its face that the property was "not insured by" the Warehouse Company; and that the Warehouse Company having sustained no loss with respect to the goods in question, could not call upon its insurers.

Here are some of the comments of the Court:—

The words of the policy are not satisfied if their import be restrained as the plaintiff in error seeks to confine it. The parties to whom the policy was issued were warehousekeepers receiving from various persons cotton and other merchandise on deposit. They were empowered by their charter to receive bailments and to make charges against the bailors for handling, labor, and custody. They were also authorized to make advances upon the goods deposited with them, and their charges, expenses, advances, and commissions were made liens upon the property. They had therefore an interest in the merchandise deposited with them, which they might have caused to be specifically insured.

It was also at their option to obtain insurance upon the entire interest in the merchandise, whether held by them or by the depositors.

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It is undoubtedly the law that wharfingers, warehousemen, and commission merchants, having goods in their possession, may insure them in their own names, and in case of loss may recover the full amount of insurance, for the satisfaction of their own claims first, and hold the residue for the owners.

There is nothing ambiguous in the description of the subject insured. It is as broad as possible. The subject was merchandise stored or contained in a warehouse. It was not merely an interest in that merchandise. The merchandise of the warehouse company owned by them, was covered, if any they had. So was any merchandise in the warehouse in which they had an interest or liability. And so was any merchandise which they held in trust. The description of the subject must be entirely changed before it can be held to mean what the insurers now contend it means. If, as they claim, only the interest which the warehouse company had in the merchandise deposited in their warehouse was intended to be insured, why was that interest described as the merchandise itself? Why not as the assured's interest in it?

The words "merchandise held in trust" aptly describe the property of depositors. The warehouse company held merchandise in trust for their customers, not, it is true, as technical trustees, but as trustees in the sense that the goods had been intrusted to them.

When they sought insurance of merchandise held by them in trust, it must have been intended of such as they held in trust in a mercantile sense, goods intrusted to them by the legal owners. That such is the meaning of the words as used in this policy we cannot doubt.

Upon the point raised by the Insurance Company that the warehouse receipts carried a notice printed across their face that the property was "not insured by" the Warehouse Company, the Court held that the Warehouse Company was prohibited by its Charter from becoming an insurer itself, and the "notice required to be given the Bailors meant no more than that neither the receiving of the goods, nor the certificate of receipt amounted to a contract of insurance."

And upon the question of contribution as between the two sets of policies, the Court said:—

The policy upon which this suit was brought covered the merchandise held by the warehouse company on storage, and not merely the interest of the bailees in that property. It follows, necessarily, that there was double insurance. The policy issued to the warehouse company and those obtained in the depositors of the merchandise covered the same property and they were for the benefit of the same owners.

The insurers are liable, therefore, pro-rata, each contributing proportionately.

The Commission Clause, as we have seen, will cover the merchandise up to its full value, irrespective of whether the bailee is liable therefor or thereon, but it must nevertheless be established, to enable a recovery for property "held in trust or on commission" that the assured's relation to such property was within the description of the policy;—that he was actually and legally in possession and that it was intended by him that his insurance should protect such owner (whose name may, or may not, be known).

Stillwell v. Staples, 19 N. Y. 401;

Lee v. Adsit, 37 N. Y. 78;

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Waring v. Indemnity, 45 N. Y. 606;
(And various cases there cited).

It has been held, however, that the mere use of the words "held in trust" in the policy implies a case of bailment in which the bailee is responsible to the owner (Stillwell v. Staples *supra*, also Utica Canning v. Home 132 App. Div. N. Y. 420) and in another and quite recent case in New York (Czerweny v. National 139 N. Y. Supp. 345) this feature is very definitely stated by the Appellate Division in these words:

"The fact that a Trust Clause was inserted in an insurance policy covering the contents of a warehouse, was strong probative evidence that the insured intended to insure another's merchandise, which was stored with him as bailee for hire."

These cases would seem to establish that the presumption is, in this State at least, that when the Commission Clause is put upon a policy, it is put there in pursuance of an intention to protect all owners of property to which the assured stands in any of the several relations described in the policy.

If, on the other hand, it be shown there was no such intention, there can be no recovery. If it were otherwise, great injustice would result, as we shall illustrate by the following example:—"A" is a warehouseman or commission merchant. "B" places property in his custody with an agreement that "A" will procure insurance to its full value for the benefit of "B", and "B" is subsequently charged a proportion of the premium. "C" also places his property in the hands of "A", but only under the terms of an ordinary bailment, with no undertaking by "A" to insure for the benefit of "C"; and suppose the value of all property on "A's" premises to be \$30,000. of which \$10,000 is "A's" own property, \$5,000 belongs to "B" and \$15,000 to "C." "A" has placed insurance of \$15,000 which fully covers his own and the property of "B" for which he is liable. A fire occurs from unavoidable accident, and through no fault or neglect of "A," the entire property is destroyed. If it is permissible that "C" may enforce a claim under the Commission Clause, the recovery of "A" and "B" would be reduced to one-half their loss, when by every rule of fairness and justice, they should be fully indemnified. Two elements absolutely indispensable, to-wit: the bailee must bring himself into proper *relationship* and establish it to have been his *intention* prior to the fire, that the policy should protect his bailor.

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As a matter of course, the presumption we have referred to cannot apply in a case where a bailee has been expressly exempted from liability (*Burke v. Continental* 184 N. Y. 77) unless, as happened a few years ago in the State of New York, the Jury should find that although the parties had entered into a written contract, that the bailee should not be responsible for loss by fire, he subsequently agreed that he would be liable, and in the case in question, the bailee on the proof stated, collected the entire loss (*Burke v. Ins. Co.* 1908, 128 App. Div. 391).

Sufficient has been said, I believe, to establish that in every case where the requirements as to relation and intent have been satisfied, the bailee is entitled to collect the entire loss and hold the excess over his own interest for the benefit of those who entrusted the goods to him.

Stillwell v. Staples, supra;
Baltimore Warehouse Co. v. Home, supra;
Calif. Ins. Co. v. Union Compress Co., 133 U. S. 387;
Johnson v. Campbell, 120 Mass. 449;
(And various cases there cited).

But this does not mean that he may deduct the loss on his own property and distribute the balance of the insurance recovery (if any) to the other owners. It was held in the *Baltimore Warehouse Co.* case, you will recall, that the Warehouse Company "may recover the full amount of insurance for the satisfaction of their own claims first and hold the residue for the owners," but it should be pointed out that as the Warehouse Company had no goods of their own and their only interest in the property was their lien for advances and storage or other charges, the Court undoubtedly referred to only such claims as were in the nature of legal liens upon the property. The right of the bailee to first deduct his charges or any claims which are in the nature of a legal lien upon the property, has been upheld in numerous decisions and is everywhere conceded.

Generally speaking, we take it the assured, having taken out insurance in his own name and at his own expense, regards it as his own to deal with as he sees fit. Possibly, if not probably, his insurance representative takes the same view, but such may not be the situation if the Commission Clause has been incorporated in his form. The question has been litigated in several States and the view now favored by the weight of authority is that, except as to his charges or claims in the nature of direct liens on the property,

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he is not entitled to deduct anything (Boyd v. McKee 99 Va. 72) but must share the proceeds of his insurance pro-rata with his bailor.

Johnston v. Abresch, 123 Wis. 130;
Snow v. Carr, 61 Ala. 363;
Siter v. Moors, 13 Pa. State 220;
Boyd v. McKee (Va.), supra;
Southern Cold Storage Co. v. Dechman (Texas), 73 S. W. 545;
(And various cases there cited).

The Courts have not only conceded to the bailor the right to demand a proportionate share of the bailee's recovery but they have held that where a bailee for hire has insurance with the Commission Clause, and fails or refuses to claim for the bailor's property, or makes a settlement with his insurers without including the loss of the bailor, the latter may, in case the insurance has not been exhausted, make claim directly upon the Companies and may maintain suit in his own name for the recovery of his loss up to an amount not exceeding the unexhausted insurance. The Appellate Division of the State of New York has so held in two cases of striking interest and importance to which we will briefly refer; the Utica Canning Co. sold goods to Lewis DeGroff & Son of New York City; after delivery to DeGroff, the goods were rejected but it was agreed that property could remain in DeGroff's warehouse pending a re-sale; no storage was to be charged except that when another customer was found, DeGroff & Son were to be reimbursed for cartage and freight charges. While the goods were so stored, the warehouse burned, with insurance on stock of \$140,000, all in DeGroff's name, with form covering:

Merchandise, hazardous, not hazardous and extra hazardous, including boxes, labels and other supplies, the property of the assured, or held by them in trust or on commission, or sold but not removed.

The loss of DeGroff & Son on their own stock was \$88,000 and that was the amount they claimed from their insurers. Prior to the settlement, demand was made that DeGroff & Son claim also for the loss of the Canning Company, but they declined so to do, and disclaimed any liability whatever with respect to the Canning Company's goods; subsequently they accepted payment of \$88,000 from their insurers in full of all claims under the policies and executed receipts accordingly, accompanied by cancellation and surrender of the policies; prior to such payment the Companies were notified of the claim of the Canning Company but denied liability on the ground that their assured, DeGroff & Son, were in no way responsible to the Canning Company. Suit was brought

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by the Canning Company in its own name directly against the Companies and judgment was granted in its favor, which was sustained by the Appellate Division in a decision handed down in May, 1909 (38 Ins. L. J. 813).

Here are some of the rulings of the court:

DeGroff & Son were bailees for hire, and having insured the Canning Company's goods, were liable to it for the damage sustained.

We think it was intended by the defendants (the Insurance Companies) that everything which DeGroff & Son should have in their warehouse in the course of their business was to be insured and this would seem to be the only purpose of the slip attached to the policy.

We think a fair interpretation and meaning of the policies was that they were intended to cover whatever property DeGroff & Son had in their warehouse in the course of their business. The plaintiff's goods were there in the course of such business; the goods were lost and the plaintiff is now entitled to the protection of the policies.

The other decision was in the case of Czerweny v. National Fire Ins. Co., (Supra,) and came down in January 1913. Herman Jedel was a dealer in fireworks and arranged to store with the A. Jedel Company (a concern in which he was interested but operated as a separate business) a quantity of matches for which he was to pay storage at the rate of ten cents per case. The goods had been purchased from Alfred Czerweny, who wrote Herman Jedel about insurance, saying—"Kindly let me know whether you as the owner, will take responsibility in case of fire, or if you expect me to cover the insurance," and the reply, also by letter, was "according to our agreement you are to effect and attend to the insurance on the matches." Czerweny thereupon procured insurance of \$1,300, but he took it in his own name. Fire occurred and destroyed the matches, as well as a large amount of property owned by the A. Jedel Company.

The fire found the following situation:—The matches were owned by Herman Jedel; they were in the custody of the A. Jedel Company as bailee, and were insured in the name of Alfred Czerweny who had parted with the title and had no insurable interest, and as a matter of course the specific insurance was void from inception.

The A. Jedel Company had insurance of \$25,000 with the Commission Clause; its loss on its own property was \$21,000, which was the amount claimed from its insurers. On payment of \$21,000, receipts in full were executed and policies surrendered for cancellation.

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Subsequently Herman Jedel assigned his claim to Czerweny who brought suit directly against the Companies which had insured the A. Jedel Company. It was conceded on the trial that the facts regarding the matches had been brought to the attention of the Companies' adjusters prior to payment of the loss, and that liability was denied.

It was contended on behalf of the Companies, that the fact that owner had arranged with Czerweny to provide specific insurance, was conclusive proof, that it never had been the intention that the matches should be covered by the insurance of the A. Jedel Company, but the Court's view was that as neither Herman Jedel or Czerweny were connected with or acting for the A. Jedel Company, the contract of the latter with its insurers could not be altered or varied by the act of these third parties, the precise language of the Court being (in part) "nor can any intention which Herman Jedel may have had in regard to the insurance be imputed to, or taken advantage of by the A. Jedel Company." The judgment affirmed the finding of the Lower Court that the Bailee intended, when taking out the insurance, to protect the owners of all property in its custody and the Companies were held liable to Czerweny for the amount of his loss.

It was conceded that the specific insurance had never been effective on account of lack of insurable interest, and the question of contribution between the two sets of policies was not raised.

The Court further found in part:

The assignee of the owner of matches stored with the insured as bailee for hire was the proper plaintiff in an action and under a trust clause of the policy for loss of the matches; the person for whose benefit a contract is made having the right to sue thereon, although not named therein.

In the absence of waiver or estoppel, the plaintiff's rights in such case were not affected by a settlement between the insured and the insurance company with knowledge of the claim of plaintiff's assignor.

There is another feature which has a very important bearing upon certain classes of cases coming under the Commission Clause, and it is the doctrine of ratification. As a matter of course, no question of ratification arises in a case where the bailee has agreed to procure insurance for the owner's benefit, or is otherwise legally liable for fire damage, and in some States, it is held that ratification is unnecessary if the insurance was taken out in pursuance of a custom of trade, but in every case where the taking of the insurance has been the gratuitous act of the bailee, the owner must show, if he

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would claim the benefits of the contract, that he ratified the transaction and adopted the contract within a reasonable time after knowledge of the same came to him, even though it be after the fire. The adoption need not have been in any prescribed form but it is a question of fact for a jury.

Southern Cold Storage & Produce Co. v. Dechman,—Tex. 1903—73 S. W. 545.

The Appellate Division (New York) in deciding the *Utica Canning Co.* also so held, in these words:

The form of policy is similar in its legal effect to the policy "for whom it may concern" and it arises in much the same way. The insurance is taken out by an agent, consignee or third party and inures to the benefit of the real owner of the goods who need not have given original authority therefor, or need he adopt the policy prior to a loss; but an adoption within a reasonable time after the loss is sufficient to bind the insurer.

The bailee, as we have seen, may collect the entire loss. In some cases he *must* do so, or he will be held personally liable to the owner. Such is the case when the insurance has been procured by the instruction or direct authority of the owner, or at his expense, or in pursuance of an agreement by the bailee to provide insurance for the owner's benefit, and it is held in some of the States that if by reason of a custom of trade, it became the duty of the bailee to provide insurance upon the property in his custody, he must not only insure such property for a reasonable amount, but must be held to "diligence and discretion" in collecting the loss (*Southern Cold Storage & Produce Co. v. Dechman supra*).

Upon receiving payment of any insurance upon the property of another, the bailee, irrespective of whether he was actually liable to the owner, must account to such owner for the entire amount collected, save only his proper charges or liens against the property (*Symmers v. Carroll* 207 N. Y. 632); "The money obtained from the insurance simply takes the place of the property itself and as a matter of course, would belong to the owner" (*Southern Cold Storage & Produce Co v. Dechman supra*).

So much for those principles, which having been interpreted by the Courts, are now regarded as settled. There are a number of other features, which in view of interpretations now placed upon the commission clause, are live and important questions but which have not been settled. One of the foremost of these is that of contribution. If, in a given case, the bailor is entitled to claim the benefit of the bailee's insurance, but happens to have specific

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insurance, in his own name, sufficient we will say, to fully cover his loss, are his insurers entitled to contribution from the bailee's policies? The affirmative was held in the Baltimore Warehouse case, but there the controlling feature, no doubt, was the fact that the specific policies were by their terms payable to the Warehouse Company.

Now I do not pretend to say that I can tell you how that question should be or is going to be settled. but here is my view of it:— I believe that when a man, having goods in the custody of a bailee, proceeds to insure the property in his own name, he does so because he does not intend to rely upon his bailee's insurance, and I would regard the existence of specific insurance in the name of the bailor, as proof conclusive, that so far as he is concerned, the element of intent is wholly lacking, but it is held by our Appellate Division in the Czerweny case, that it is the intent of the bailee, which controls, and that no intention which the bailor may have had in regard to the insurance, can be imputed to, or taken advantage of, by the bailee. If that is a correct statement of the law, it certainly would seem, in a case where the bailee did intend to cover all the property in his custody, and the bailor duly ratifies and adopts the contract, both sets of policies would then cover the same interest, and it is difficult to see why the specific policies are not, in that situation, entitled to contribution from any unexhausted portion of the bailee's insurance.

Another question probably no less important is that of co-insurance. The Society has already been treated to a very able and full discussion of this topic, in a paper which leaves little, if anything, to be said under this head, and we will dismiss it with a word as we pass along. We will all agree that the question of whether the value of the property of others in the custody of the assured, is it to be taken into account for co-insurance depends upon whether the policies cover it. We have seen the construction which, without exception, the Courts have placed upon the wording "held in trust or on commission," which makes of it not a question of whether the bailee was liable, but did he intend the owners should have the benefit of his insurance? The mere use of the words of the Commission Clause, you will recall, is held to create the presumption that such was the intent. Unless such presumption be overcome, all such property was under the protection of the policies and must be included. Particularly will this be true if there has been

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a ratification by the bailor. in fact, in such a case I should say there is no alternative, and the assured may only get what comfort he can from the reflection that he may be suffering from an over-dose of liberality, either self-administered, or on the part of the gentleman who got up his form.

Up to the Utica Canning case, it seems to have been everywhere held that the mere voluntary act of the bailee in procuring insurance with the commission clause, involved him in no duty or liability to the bailor, unless he collected insurance money upon the bailor's property, but in the case to which reference has just been made, the Court seems to have gone much further: The holding was—"Lewis DeGroff & Son were bailees for hire, and *having insured the property, were liable to it* (meaning Utica Canning Co.) *for the damage sustained*. Until there shall be some other or further ruling, the words I have just read you is the law of this State. Does it mean that a bailee, liable under the common law for reasonable care only, will by the mere acceptance of a policy containing the trust and commission clause, make himself liable for every damage by fire which, under any circumstances, may occur to property of others on his premises? If so, is his liability absolute or conditional upon his being able to collect from the Insurance Company?

These and numerous other questions growing out of the very general, and I may say indiscriminate, use of the commission clause, are yet to be decided, including no doubt, many features which have not yet occurred to any of us, and having no ambition to be known as a prophet, I prefer to withhold my guess as to the outcome. All we really know is that the end is not yet.

Up to this point our consideration has been directed to what I would term the usual form of commission clause, "held in trust or on commission, or sold but not delivered or removed." There are variations in somewhat general use which are chiefly distinguished by a reference to the assured's liability. A favorite form is "and (sometimes the word "or" is used) for which the assured may be legally liable." When used in the precise form stated, the additional wording is in no sense restrictive, but rather the reverse, as it adds one more class (that for which the assured may be legally liable) to the cover of the policy, but if the words "for which the assured may be legally liable" are used, without the prefix "and" (or its running mate "or"), the restriction is, of course, very pronounced and gives to the clause the precise mean-

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ing which was originally intended. Your commission clause would then read, "Held in trust, or on commission, or sold but not delivered or removed, for which the assured may be legally liable" and your assured's loss, as to the property of others, would be measured accordingly.

We have all been taught as one of the fundamentals of our business, that the contract is an insurance of the person and not of the property. I realize this to be true even as regards the commission clause in its broadest form, although I confess there are times and places, to which one will come in an examination of this question, when one's faith in early teaching will be shaken for a moment, but the insurance contract is still, as it always has been, a personal contract, but under the commission clause. of the form now generally in use, the Underwriter does not always know who that person is: Sometimes even the assured does not know and frequently, nobody knows: That the Underwriter ought to know is another of those fundamentals upon which our business is grounded, the wisdom and propriety of which is nowhere denied.

The time is not only coming, but has arrived, when in the interest of both the assured and the Companies, there should be some reasonable and definite limit upon this form of contract. Its scope is controlled, as we have seen, by the intent of the bailee, but in scarcely one case in a hundred can the bailee tell you what his intent was, because he had none. Probably he learns for the first time, after the fire, that there is such a thing as the Commission Clause, much less that he has one on his own policies. and where the assured gives the matter any thought at all, he undoubtedly understands and believes the clause is to protect him only in case he shall be liable. In the great majority of cases, that is all the assured intends to cover; it is all he wants or needs and all he ever supposed he had, and when he comes to understand the situation, it will be all he will be willing to take. It is no longer any compliment to the assured, or a safe or wise thing to bestow upon him an unqualified form of commission clause, unless there is some occasion for it.

In the isolated case where by reason of a special situation, the assured requires a broader form of policy, you will, as has already been suggested upon this floor, best serve him if you divide the cover into two contracts, one to cover property of his

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own (including goods which he may have sold but which are not yet delivered), and another "for account of whom it may concern" to apply to such of the described property as may be "held in trust or on commission and/or for which he may be liable," and although questions bearing on the construction of the Commission Clause will necessarily continue to arise, in case of loss your assured's interest as to such matters would be very largely that of a spectator, and he will learn then, if not before, that the contracts you have provided to meet the conditions of his case, have not only been good, but the best and the best is good enough.

XXXVII USE AND OCCUPANCY INSURANCE

JOHN A. ECKERT

We workers in the insurance profession are influenced by our respective occupations, and subjects of this character are liable to be viewed from one angle by the underwriter and the adjuster, and from another angle by the broker.

The experience of the underwriter and the adjuster is derived from a review of many claims presented under all kinds of conditions, from which he judges a certain class of insurance, and because of this experience, with all that it implies, the underwriter and the adjuster are liable to view a unique or unusual form of insurance with caution.

The broker, on the other hand, while perhaps not having as much experience in the matter of technical adjusting, looks at unique and unusual forms of insurance from a much different viewpoint, because, in his profession, he meets thousands of insurers who desire only reimbursement for their actual losses and pay their premiums and expect to receive such reimbursement if a loss occurs. Among these thousands there is only an occasional loss claimant.

It seems to me, therefore, in order to be able to say anything on this subject which has not already been said, that I must discuss it along the line of my experience, somewhat from the standpoint of the public, and endeavor to justify its existence, and attempt to minimize the doubts and fears which are so often expressed by underwriters as to the wisdom of writing this form of insurance.

It appears that Use and Occupancy Insurance was first written in this country through the efforts of two prominent New England insurance men, interested in stock company insurance, who induced a number of prominent companies to write this class of insurance on highly protected New England factories, in fact, it is said that their object in doing so was to make up to the stock companies premiums lost to the New England Mutual Insurance Companies, and to offer this form of coverage in connection with straight insurance against fire damage in order to defeat the competition of the New England Mutual Companies who were not then prepared to write it.

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It would seem that the ideas of the promoters were sound and their efforts successful, for we find now that Use and Occupancy insurance is very generally carried by the large mill owners throughout New England and elsewhere, and the New England Mutual Insurance Companies write it quite as freely as do the Stock Companies.

It has been suggested that the term "Use and Occupancy" might very well be discarded, and another name applied to this form of insurance which would more clearly describe its character. The term "Business Interruption Indemnity" has been suggested. Whether or not this suggestion is a good one depends entirely on whether a uniform contract will eventually be adopted or come into common use by the companies which will clearly define the coverage.

In view of the many different forms of contract which are now being used, which result in many wide differences in the matter of loss payments under Use and Occupancy policies, something should be done for the guidance of the public and for the purpose of enabling the companies to determine how to underwrite this class of insurance by way of providing a standard form of contract so that the public may at all times know what a Use and Occupancy policy means, and the companies may at all times know what their liability is under such policies.

Several companies have adopted their own Use and Occupancy forms, but it is my opinion that they very rarely have an opportunity to use them unless they take the order for the insurance direct from the assured or are dealing with an agent who has very little knowledge of the subject. Most all large agencies have their own form, and most every large brokerage office has its own form, with the result that we very rarely see two forms alike, and by this is meant alike as to application and coverage.

The following insuring clause is taken from a form in somewhat general use and is quoted as a basis for the discussion of this subject. It is by no means the only form used, but it is a fair sample; with a few exceptions the clauses are the same or if the words are not the same the meaning is practically the same:

On the use and occupancy of premises situate.....
.....

It is understood that if by reason of fire, the assured shall be wholly prevented from producing their product or conducting their business, then this Company shall be liable for \$..... per diem for each working day from date of said fire to date (whether the same fall within the term of this policy or not), when the normal production of their product has

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been resumed, or could with reasonable diligence be resumed; but if the normal production is diminished only then shall this Company be liable for that proportion of said per diem in which said production is diminished. In case the production be diminished by fire, as above specified, the average daily production for the twelve months in which the plant has been in full operation immediately preceding the fire, shall, for the purpose of this insurance, be assumed to be the normal daily production. This Company shall not be liable for more than the amount of this policy.

Let us take the terms "shall be wholly prevented from producing their product or conducting their business."

There have been several controversies in the adjustment of Use and Occupancy losses arising over the question as to whether the disablement by fire of a certain department of a manufacturing plant, preventing the completion of finished product, constituted a total per diem loss. Unless a plant is totally destroyed it is likely that certain departments will be left intact and capable of performing their work; therefore, in such a case the words "wholly prevented from producing their product" would have to be construed in a spirit of fairness by the adjuster and the assured. An assured could hardly expect to collect a total per diem loss if he is operating a part of his plant, and if he is doing a prosperous business and is desirous of filling his orders he would no doubt prefer to operate such part of his plant as it would be possible, and accept, from the insurance companies, a reduction from his per diem loss, unless the conditions of his business were such that it would be impossible for him to do so.

Forms have been issued reading:

Shall be wholly prevented from producing finished goods.

But to hold an insurance company for a total loss because of this phraseology, when it would be possible to advantageously operate part of the plant, would be unfair, and would result in discouraging the companies from writing this class of insurance, except under a limited form which would make this class of insurance less attractive to many insurers who desire to be fair in the adjustment of their losses and to collect only the measure of their actual loss.

The words "or conducting their business" in the above form appear to be inserted to cover risks, part of which are occupied as sales or distributing departments. There are many such risks where the product is manufactured in part of the premises and removed to another part for storage, sale or distribution, and the loss or damage to such product while on storage, sale or distribution, if located in premises occupied in part for the manufacturing of the product, would quite as readily result in a Use and Occu-

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pany loss as would the stoppage of manufacturing should the fire occur in the manufacturing part of the plant.

Shall be liable for \$. per diem for each working day.

This phraseology seems to make the contract a valued policy. Some companies insist upon inserting the words "not exceeding" before the stated amount payable per diem, which insertion apparently takes from the contract the valued feature thereof and would necessitate the proving of a loss by items and figures in detail.

Shall be liable * * * to date when the normal production of product has been resumed or could, with reasonable diligence, be resumed.

This feature of this form makes the term for which the companies are liable for the per diem loss a matter of adjustment on the same basis as a rent loss would be determined, by arriving at the time when production could be resumed amicably, if possible, or otherwise by appraisal.

The latter part of the above form which provides, in case of partial stoppage of product, that the loss shall be settled on a percentage basis, based upon the average normal production for the twelve months in which the plant has been in full operation immediately preceding the fire, might result in a surprise party either for the company or the assured, depending upon the capacity at which the plant was operating at the time of the loss, as follows:

The normal daily production of a plant for the twelve months preceding a fire might be \$3,000 per day. In these times the same plant might be running at double its capacity. as many plants are now running, and the production valued at \$6,000 per day. If a fire should occur and result in a 50 percent stoppage it is evident that the stoppage would amount to \$3,000 per day. 50 percent of the normal daily production for the twelve months preceding the fire, however, would figure out \$1,500 per day. The remedy for this condition would seem to be for the insured to revise and increase his Use and Occupancy insurance at times of extraordinary production. This condition of affairs would operate in an opposite manner if a fire should occur in a dull period following an extraordinary busy period.

Where the product of a plant is known to fluctuate during the year, with a large output in certain months and a small output in other certain months, brokers and agents have been known to

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provide in the policy for the payment of a greater per diem sum during the period of large output and a lesser per diem sum during the period of small output.

It is sometimes argued that there is no co-insurance feature in connection with Use and Occupancy insurance. I believe, however, that it is the usual practice for companies to demand, and for brokers and agents to issue, policies in amounts equal to three hundred times the daily per diem amount stated in the policy. This practice provides a fair substitute for a co-insurance clause.

Use and Occupancy insurance is written to cover against the hazards of explosion, windstorm, sprinkler leakage and lightning, the lightning hazard usually being included in the policy against fire. There has been considerable explosion Use and Occupancy written during the last year or so.

There are so many technical questions involved in the adjustment of Use and Occupancy losses, and so many different views indulged in by the assured, agent, broker and adjuster as to the coverage, that the inclusion or omission of a word or two here or there in the form may alter the entire aspect of the contract, and result in a controversy as to the amount of the loss, thus causing dissatisfaction on the part of either the companies or the assured.

The elements of this class of insurance on which there seems to exist differences of opinion are:

First—Whether some of the contracts used constitute valued policies and whether, as a matter of good underwriting practice, valued policies should be issued or whether the assured, in case of loss, should be obliged to prove his loss by items and figures.

Second—Whether this class of insurance creates a severe moral hazard and should be avoided for that reason, and for the further reason that if freely written it would increase the moral hazard in connection with the insurance on the buildings and contents of the same risk.

Third—Whether it is a blanket policy covering rents, profits and leasehold interest under the name of "Use and Occupancy."

Mr. W. N. Bament in a very able article on this subject, written about four years ago, says:

There has been a feeling, which still exists in some quarters, that this class of insurance tends to increase the moral hazard, but probably on account of the discriminating care on the part of companies in selecting their risks the record thus far has failed to justify these fears.

Whether or not Mr. Bament has had reason to change these views since 1912 I do not know, but it seems evident that his views on this subject are far-reaching by reason of his large experience as an adjuster and his association with a company writing a considerable volume of this business.

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As to whether the forms of contract at present being used constitute valued policies depends entirely on how such forms are constructed. Probably many of the contracts now in force are valued policies, while there are many which are not. There seems to be little doubt that this form of insurance can be made valued, depending upon the ability of the agent or broker in preparing his form, and that valued insurance can be obtained, depending upon whether the underwriters will accept such forms.

The next question which arises is to whether it is good practice, from an underwriting standpoint, for companies to accept forms which constitute valued policies. It is needless to say that at the same rate the valued policy is more acceptable to the assured. In these times of aggressive business methods large firms direct their energies and efforts in many ways and in many places and at large expense for the purpose of selling their product. It is apparent that reimbursement for physical damage to buildings, machinery and stock at market prices, only partially covers the loss of such firms. Many of them maintain agencies throughout the country with fixed expenses, which must necessarily be continued at a loss unless the product which they are employed to sell is forthcoming from the source of production. If the plant is seriously crippled by fire these agencies cannot be discontinued without crippling the business organization. These same firms may be employing a force of traveling salesmen whose services cannot be dispensed with without injury to the business, and they may be carrying advertising expenses which cannot be very well discontinued. The agencies, the salesmen and the advertising are expense factors not a part of the physical plant, but they result in a serious loss if the operation of the plant is interfered with. The plant taxes are not abated when fire occurs, and if bonds or mortgages exist the interest on them must be paid, and trained and experienced heads of departments, executives, etc., must be kept on the payroll, as well as many other similar and less important expenses continued while the plant is unproductive. Furthermore, a fire may occur in a plant, the product of which must be delivered in time to supply a season trade. If such plant should be seriously damaged by fire the season's business could be lost, resulting in a financial loss which would be difficult to calculate.

All of these items seem to constitute proper insurable hazards, and now we come to the question of insuring profits.

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If the valued feature of these contracts, which are in general use, is eliminated, then I believe there is grave doubt as to whether fixed expense charges which do not apply to the plant would have to be admitted by the adjuster, or, in other words, if the form is not a valued one, specific or general language should be used to clearly set forth just what the policy covers in much the same manner as we describe property covered under regular fire insurance policies for instance, a form such as is generally used to cover machinery.

Why should not a reputable concern, doing a prosperous business, be able to insure against the loss of profits in order that their dividends may continue and their surplus be protected from depletion?

It may be said that all of these losses are subject to proof and that there is no justification for the issuance of a valued policy. The answer to this assertion is that there is grave doubt as to whether losses of this character can be proved without controversy between the insured and the adjuster and a resort to compromise.

If it is the purpose of the company, in issuing a Use and Occupancy policy, to protect the insured against loss resulting from the interruption of his business, and if the Company is averse to issuing a valued policy, then the form should be so constructed as to cover all the factors referred to, which would result in loss; and if such a form is written and all of such factors included in the loss, it would seem as though the insured, if he choose, could present a formidable claim which it would be very difficult for the adjuster to analyze.

If the foregoing statements are sound it would seem that a valued form of policy will, in the long run, prove most satisfactory. It will give the assured what he needs and pays for, and if his loss exceeds the amount of insurance which he carries, he can have no complaint. It makes possible more easily adjusted losses without controversy, which sometimes injures the reputation of the insurance companies.

The real solution of this problem, from the company standpoint, is careful and thoughtful underwriting. It is an accepted fact that no prosperous concern can afford to have a serious fire, no matter how well they are insured. The underwriter has facilities for learning whether an applicant for Use and Occupancy insurance is a prosperous concern. He can review the character

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of the business conducted and the machinery in use, and determine whether same can be promptly replaced or repaired, and thus inform himself as to whether his per diem loss is likely to extend over an abnormally long period by reason of the inability of the insured to promptly rebuild his building, equip it with machinery and replenish his stock of raw material to enable him to begin operations as soon as possible after the fire.

There is no doubt that a large majority of Use and Occupancy risks, when selected with care by the underwriter, have proved a profitable form of insurance. It is true, however, that here and there a loss has occurred and a claim made which has proved troublesome. The factors which have resulted in troublesome adjustments have no doubt largely consisted of inability to replace machinery, to secure raw material, and unreasonableness on the part of the assured. These are factors which can be foreseen to some extent at least at the time of the issuance of the policy.

It should be an easy matter for an inspector, if he would depart from the beaten path, to ascertain whether the machinery in the plant is of foreign make, and whether it can readily be replaced if of domestic make. At present the inspection report often deals with the conditions of construction, protection and exposure only.

As to the attitude of the assured, I cannot believe that a prosperous concern, doing a staple business, would be content to allow its plant to be shut down and remain idle for the sake of collecting a few hundred dollars per day Use and Occupancy loss, while orders are waiting to be filled, if it were possible for them to put their plant in an operative condition. Therefore, it seems to me, that whatever bad experience the companies have had in this class of insurance, which has resulted in criticism of it as a class, has resulted from a lack of the same discrimination which the companies generally exercise in accepting ordinary fire risks. If all this is so, and this business is profitable as a whole, it is high time that the companies adopt a more discriminating method in selecting their risks, by refusing to approve applications on risks which may lead to troublesome losses for reasons stated above.

Use and Occupancy Insurance, as a class, should not be viewed with alarm because of this lack of discrimination. On the other hand, I believe it would prove to the advantage of the companies

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if they were to make an effort to increase their volume of this class of business, properly selected. Neither should Use and Occupancy insurance be considered in the light of an experiment, and the broker specializing in this class of insurance and writing a large volume of it should be credited with doing a constructive work, and not be considered as engaging in undesirable practices.

There is a speculative element associated with Use and Occupancy insurance, when written under a valued form, which has not been referred to in any of the papers or speeches which I have read and heard on the subject. Under the present underwriting methods an insured is at liberty to carry as much Use and Occupancy insurance as he is willing to pay for. This permits an insured, knowing that he has a plant subject to probably total destruction, to carry insurance in excess of all probable loss. For instance, a man with a plant such as I have referred to, who might easily cover all his indirect losses with Use and Occupancy insurance amounting to \$60,000, which would provide for the payment of \$200 per day, might figure that it would be a good speculation for him to carry insurance to the amount of \$120,000, thus enabling him to collect \$400 per day. Such an act would not be considered exactly honest by the underwriter, but the average business man, not being imbued with the spirit of "Indemnity Only" which exists in the mind of the underwriter, would not think there was anything wrong in effecting excess insurance under such circumstances, so long as the companies were willing to issue the policies and accept his premium.

This may constitute a dangerous feature in Use and Occupancy underwriting, but such a practice could easily be obviated by the underwriter demanding information as to the total insurance carried on Use and Occupancy by the insured whose application he is considering, and he might also properly demand that the total amount of insurance carried be stated in the policy. He could then, by investigation, determine whether that assured was justified in carrying that amount of Use and Occupancy insurance. If he is willing to issue a liberal policy he is entitled to be surrounded by some safeguards in connection with its issuance.

I believe that Use and Occupancy is an entirely sound and justifiable form of insurance which if carefully considered before writing will prove just as profitable to underwriters as any other form. It does embrace some of the features of rent insurance.

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profit insurance and leasehold insurance, but that is no reason why the underwriter should say to the manufacturer we will not cover you for Use and Occupancy insurance—insure your rents separately if you are liable for them, or your rental value if you own the building, and insure your leasehold interest if you have an insurable hazard therein, or insure your profits separately. I believe that the same underwriting skill and thought should be applied to this class of insurance as is applied to insurance against physical damage to property, and that with such application of skill valued policies can be written, and the volume of this business very largely increased. It is volume and average from which the underwriter can best judge whether a class of business is profitable or not.

A much larger volume of Use and Occupancy insurance can be written and should be written if companies will issue a liberal form of policy for assureds whose records show that they are entitled to same, and agents and brokers will give more attention to this class of business and explain its features to their clients. It must be remembered that there are certain advantages to the underwriter in this form of insurance which he does not always enjoy in settling a loss on physical property.

For instance, a plant may be totally destroyed, involving a total loss on buildings, machinery and stock, which would result in a much less than total loss on Use and Occupancy, allowing that the plant could be replaced in less than twelve months. Again a plant might be visited by fire and a delicate stock very severely damaged, resulting in a large loss on stock, which would result in only a moderate loss on Use and Occupancy because the plant could be put in operation in a short time.

Even though valued policies are issued the assured is under obligations to put his plant in running order in as short a space of time as possible, and the company has a right to demand that he does so. Many claimants will endeavor to secure as liberal a settlement as possible on buildings, machinery and stock, and at the same time will put forth every energy to get their plant in running order as soon as possible.

In the first instance their interest lies in making as liberal a settlement as possible, while in the second instance their interest lies in rebuilding and operating their plants as promptly as possible, thus reducing the Use and Occupancy loss, because of the ever-prevailing competition in business, threatening that greater and

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uninsured loss—the loss of trade, the diversion of customers, in the upbuilding and acquirement of which years of effort and large expenditures of money have been invested.

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XXXVIII
USE AND OCCUPANCY; PROFITS AND COMMIS-
SIONS; RENTS AND LEASEHOLD INSURANCE

LEO LEVY, Lawyer

In the present (adopted 1886) New York Standard Form of Policy, at lines 38 to 44, inclusive, are various words, phrases and clauses which seek to exclude certain items of fire loss from the coverage of the policy.

The first part expressly declares that the insurer shall not be liable for loss to accounts, currency, deeds, evidences of debt, etc., and the words are clear and unmistakable.

Immediately following and in the same paragraph is found language which in many respects seems confused and ambiguous, with misleading punctuation. It begins with the expression "nor unless liability is specifically assumed hereon for loss to awnings, etc., * * * property held on storage or for repairs or by *interruption of business, manufacturing processes or otherwise.*"

We are all familiar with the forms in daily use which take from the above excluding clause its operation upon items such as patterns, models, signs, store and office furniture and fixtures, property held on storage or for repairs, and the substitution of direct coverage and the trust and commission clauses.

The words, however, "nor unless liability is specifically assumed hereon for loss * * * by interruption of business, manufacturing processes or otherwise" cannot be dealt with so lightly.

I am unable to say what was intended by the word "otherwise" except that the phraseology indicated when read as above means that the insurer should only be liable for direct loss of cash value as distinguished from consequential or indirect loss, which, though invariably following a fire damage, is not secured to the assured unless liability therefor has been specifically assumed elsewhere in the contract.

It has been believed that strictly it is neither permissible nor legal to insure against loss by interruption of business or manufacturing process under this Standard Form, but it would seem that the language employed does warrant the writing of such insurance coverage and should a policy have been issued wherein obligation is assumed for damage by "business interruption, manufacturing processes or otherwise" the insurer would be estopped from asserting "*ultra vires*" or invalidity.

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It is assumed for the purposes of this paper that a bargain has been made and a form adopted which expressly covers the subject matters of the paper and thus there are called up for discussion some of the questions that have arisen and have been determined by adjudication and it is hoped that comment thereon may serve as help in avoiding disputes.

It may also be taken for granted that in the discussion of these various subjects most of them have to do with ambiguities due to diversity of form; and in practice it is to be noted that there exists at the present time no uniform or standard rider which under the section of the insurance law is authorized to be attached to the policy which describes these interests. It is to be borne in mind that the courts universally say that though there might appear hardship or injustice in particular cases, "*all ambiguity or doubt as to the meaning of terms of policies having no accepted significance, such ambiguity or doubt would be resolved against the insurer.*" If it appear that what was intended to be covered was "interruption of business, manufacturing processes or otherwise," no matter what phraseology may have been employed, such intent once established, there would be secured to the policy-holder by court adjudication the loss suffered and not coverable by insurance against the destruction of the physical property.

Before referring to the different classifications outlined, it may be in point to call attention to an extreme to which the courts have gone in aiding an assured in establishing *cash value*. This in the well-known case of *Phillips v. Ins. Co.*, 128 App. Div., 528, where it was held that upon the ordinary and usual fire policy covering *merchandise* a loss occurred to straw hats which had been completely manufactured, sold, cased for shipment but not delivered, and the delivery of which was to have been begun the day after the fire and to have continued for a period of months thereafter; since it was impossible to rebuild the plaintiff's factory in time for *seasonable reproduction* and the merchandise was not purchaseable in the open market, the Company was liable for the *cost* of manufacture *plus the profits* which had been included by the assured in the actual selling price and that the *cash value* as thus determined was not the cost (straw hats, it being held, were not an ordinary staple) but the *price at which the assured had agreed to sell*. There was a strong dissent in the case to the effect that as the selling price included profits such profits should not be recoverable under

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the policy insuring merchandise, as there was no insurance of profits *as such*.

The point which I am seeking to make is that the insurance now discussed is intended to secure to or indemnify the assured against loss of that which might roughly be termed profits as distinguished from the other kinds of insurance attempted to be covered in this paper.

Profits have been defined as "the expectation of pecuniary gain or advantage from the continued existence of the thing insured." In the old case of *Insurance Company v. Coulter*, 3 Peters (U. S.) 222, profits were said to be "a mere excrescence of the principal—the sums added upon the value of goods beyond the prime cost."

In the year 1830, where the subject matter of insurance was profits of a certain voyage, it was held that it was not a matter of inquiry at the instance of the insurer to speculate as to whether or not profits might have been earned had the voyage (interrupted by the destruction of the vessel by fire) been continued to its projected conclusion. The question was to be disposed of upon reason and principle. That the loss of the cargo must necessarily carry with it the loss of profits, and that the rule thus adopted had convenience and certainty to recommend it.

"Here was a voyage of many thousand miles to be performed, final profits of which must have been determined by a statement of accounts passing through several changes, some of which might have resulted in loss, some in gain; and in each case the good or ill fortune of the adventure turning on the gain or loss of a day in the voyage. What human calculation or human imagination could have furnished testimony on a fact so speculative and fortuitous? To have required testimony to it would have been subjecting the rights of the plaintiff (the assured) to mere mockery."

This language used so long ago was reaffirmed by the same august tribunal in 1899 in the case of *Sugar Refining Company v. Insurance Company*, 175 U. S., at page 624. In that case the policy read to a fixed amount of profits on a cargo of sugar and it was decided in addition that even though a part of the cargo was salvaged there had been a total loss within the fair intendment of the contract.

Necessarily there is involved in the discussion of profits the question of insurable interest, and in that connection it might be instructive to dwell upon what has been held to be insurable where the ownership is not in the insured, and this is referred to as pointing the distinction to be borne in mind, to wit: that though the

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provisions of the Standard Form would void the insurance if the assured were not sole and unconditional owner, etc., it would seem that insurance upon the intangible property rights under discussion are unaffected by lack of legal title, provided only that there existed in the assured a sufficient insurable interest.

As far back as *Riggs v. Commercial Ins. Co.* (125 N. Y.) it was held that a stockholder of a corporation holding no title to the corporate property except by such indirect ownership could legally insure such interest; and that the insurable interest was really to be determined by the rule that

"If a person be so situated with respect to the subject of insurance that its destruction would or might reasonably be expected to impair the value of that interest, an insurance on such interest would not be a wager, whether such interest was an ownership in or a right to the possession of the property or simply an advantage of a pecuniary character having a legal basis, but dependent upon the continued existence of the subject." but further noting

that the mere hope or expectation which may be frustrated by the happening of some event is not insurable.

In the given case the stockholder's right to dividend or final disposition of the corporate property possibly prejudiced by the casualty insured against was a sufficient showing of insurable interest which supported the right of recovery of the indemnity.

See also *Cone v. Niagara Ins. Co.*, 60 N. Y. 619; *Wilson v. Jones*, Law Reports, 2 Exch. 139; *Herkimer v. Rice*, 27 N. Y. 163; *Rohrback v. Ins. Co.*, 62 N. Y. 47; *Oil Co. v. Ins. Co.*, 106 N. Y. 535.

With respect to the headings of the paper:

- (A) Use and occupancy,
- (B) Profits and commissions,
- (C) Rents and leasehold,

it may be said generally that in principle there exists no difference in coverage and for the purposes of this paper the definitions here given may be taken as explanatory.

"Use and occupancy" has been judicially defined "as being the business use of which the described property is capable." *Tannenbaum v. Simon*, 40 Misc. 175, 84 App. Div. 642. Also, "as applying to the status of property and its continued availability to the owner for any purpose he may be able to devote it to" (*Michael v. Prussian National Ins. Co.*, 171 N. Y. 25) as seen in the instance of a grain elevator or a hotel, the business availability of which might be impaired or destroyed by fire loss to the structure. See *Chatfield v. Ins. Co* (71 App. Div. 164).

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Profits have been defined and stated "as the expectation of pecuniary gain or advantage from the continued existence of the thing insured."

Rents as such are sums derivable from real property interests and to the assured lost by fire because of the interruption of the continued enjoyment of the property; and as to the tenant under lease, the destruction or impairment of the same property right for which the lessee has paid or is obligated to pay.

A

USE AND OCCUPANCY.

Use and occupancy upon this accepted definition is wide in its coverage.

The business use of which described property is capable would ordinarily mean that purpose to which the assured might, could or would devote the property to produce income which, if prevented by a casualty insured against, to wit: fire, would immediately and justly give rise to a claim for loss; the question seriously to be considered would be the measuring of the liability to the insured. What in a given case might be held to be a valued policy, in another would leave open and subject to proof the question of damage.

There have been examined for the purposes of this paper a great many forms of use and occupancy coverage; some prepared by insurer, by broker and others by apparent cooperation of the two.

Many times there have been added to the form reading use and occupancy the words "including fixed charges." Necessarily the implication would follow that there was intended to be covered those items of expense which would have to be met by the assured even though the property itself were damaged or destroyed, as, for example, interest on mortgages, salaries to employes under contract, and many others which, as accounting propositions, would have to be added to the loss defined as the impairment of the business use of which the described property is capable; there is, as stated, *no uniform rider and each case must be taken on its own facts.*

A reading of the adjudicated cases leads to the conclusion that "use and occupancy" is a broader cover than "Profits, Rents or Leashold."

BUSINESS INTERRUPTION, RENTS AND LEASEHOLD

In the well-known case of *Michael v. National Ins. Co.*, 171 N. Y. 725, known as the grain elevator case, the "use and occupancy" of a grain elevator against a fire loss which "would prevent the elevating and other handling of grain" was involved. The oft laid down ruling that any of the general conditions of the Standard Form which were found to be repugnant to or inconsistent with statements otherwise in the contract, those which were most favorable to the assured would be held to be controlling, and that the expectation of profits and earnings derivable from property not alone were conveyed by the words "use and occupancy," but that the definition first above quoted as to use and occupancy was the one which would govern the Court in defining the obligations of the insurer, and that had it been the intent of the insurer to limit its coverage to earnings and profits alone, appropriate and unmistakable words therefor would have been used and not the words "use and occupancy."

It was the insurer's contention in that case that the coverage "use and occupancy" meant such earnings and profits which *would have been* derived by the assured from the *actual* operation of the elevator and since it was shown as a fact that by virtue of arrangements or agreements made by the owners of the elevator this particular property was not in operation, there did not result to the assured any loss which was recoverable. Such contention was held to be ill-founded.

Again, in the two cases of *Tannenbaum v. Simon*, 40 Misc. 174, and *Same v. Freundlich*, 39 Misc. 819, under the well-known form of broker's contract where the assured had agreed to carry insurance including that upon "use and occupancy" *building and rents*, the brokers plaintiff claimed damages for the assured's failure to carry the kind of insurance specified, and sought to establish that the measure of damage under use and occupancy insurance was the profit which the defendant insured had made upon the premises and shown by computations covering a period of years. The Court held that such profits were not in any wise valid elements usable in ascertaining the amount of insurance which the broker's customers had agreed to carry, and that "use and occupancy" was not and could not be profits or estimated profits from earnings, however ascertained, and that the record of the business for prior years had no direct bearing upon the establishing of the value of use and occupancy and could not legally measure the damage.

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In the absence of express language clearly indicating the contrary, the writer is inclined to the belief that a policy upon "use and occupancy" as such would be held to be valued, and that if it be sought in practice to avoid such a construction, there should be clear expression by simple and unambiguous language of exactly what measure of damage is to be applied and that the intent to leave the ascertainment of damage as under an open policy should be made unmistakably clear.

B

PROFITS AND COMMISSIONS.

As indicated, profits and commissions attempted to be secured to the insured under contracts in question are those having to do with the future and which are lost to the assured by reason of the casualty.

The Court decision above referred to as to "what human calculation or human imagination could have furnished testimony on a fact so speculative and fortuitous that to have required testimony would have been subjecting the rights of the assured to mere mockery" is indicative of the difficulty of laying down a measure of damage which would limit the right of recovery on a profits or commission contract, and in seeking to define liability of the insurer under contracts covering profits and commissions, it has already been pointed out what profits are and what it is the Courts might say would be secured to the insured under a policy which read on profits, and it is to be noted that there is very little, if any, distinction between the words "profits and commissions."

In the case of *Lite v. Ins. Co.* (119 App. Div., 410, affirmed 193 N. Y., 639, without opinion) the lessee was insured against loss of profits that inured to him under lease of a certain building. The fire rendered untenable a substantial number of the apartments in the building. The owner, under the terms of the lease, was obligated to and did grant to the assured lessee a diminution of rents, and it was held that the policy, which read, as stated, with various provisions as to how the loss should be computed, did not for all purposes make the policy a valued one, but it was valued only in the event of a total loss and that it was proper to show any loss which resulted to the assured, although not ascertainable by the monthly limit fixed in the contract; and, though it would be difficult to fix the amount of *partial loss*, the assured had shown enough to have justified a *jury* in saying that there had been a loss sus-

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tained, and since there might be reasonable precision in the ascertainment of such *partial loss*, it was for the jury to be precise and reasonable. There was strong dissenting opinion that there having been actual diminution of rent allowed by the landlord there was no actual loss in fact suffered by the insured and there should be no award of damage.

In the case of *Oil Company v. Ins. Co.* (106 N. Y., 538) the policy by its terms insured royalties under a patent licensing agreement to be earned in an oil reducing and filtering works. There again came up the question of the measure of damage, and it was contended by the insurer that since the fire did not cause a *reduction in output* and hence a lessening of royalties, there had been no loss that was recoverable. The Court held to the contrary, saying that the earning power under the royalty contract was affected by the fire which destroyed the refinery and that the injury to the assured was to his right to receive royalties and came from the enforced idleness of part of the refinery and that the assured upon proving what the oil works *could have earned* and which the fire prevented it from earning, was sufficient proof of damage.

On the question of commissions, the case of *Hayes v. Ins. Co.*, 170 Mass., 492, is instructive. Plaintiff was an agent of an insurance company and was entitled to receive under his contract as compensation the sum equal to twenty percent of the premiums on policies issued by him and an extra compensation of ten percent on the *net profits on all of the business* of the company. It was decided that the agent had an insurable interest in the property insured by the Company sufficient to support a policy issued to him which covered his compensation as specified in the agency contract, the Court saying that the property belonging to others and which was to them insured under the policies of the Company employer, even though not owned by the employe agent, would, if destroyed, deprive the agent of his extra compensation by depriving the Company employer of profits on the business, and since this would bring to the agent a direct pecuniary loss of the profits of the insurance company which he was to receive, there was established an insurable interest recoverable under the particular contract of indemnity there before the Court.

C

RENTS AND LEASEHOLD:

The interests thus affected are described for the purpose of illustration in *Casey v. Ins. Co.* (33 Hun., 315). The policy cov

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ered a lease of a building. The lessee had sub-let the same, by which there was netted to him a yearly profit.

The fire partially destroyed the premises so that they were in fact untenable. The assured claimed the loss of several months' rent, to-wit: the sum of rent *receivable* in excess of the rent to be *paid*. It was held that this was the right measure of damage on this form and that that was the security or indemnity which the lessee insured and had contracted to have made good to him. This is almost parallel to profits insurance, although classified as rent insurance. At the same time ordinary rent insurance would be the income derivable from property as rents which are lost to an owner or lessee by reason of the partial or total destruction of described property.

In the case of *Hellar v. Ins. Co.*, 177 Pa. State, 202, the insurance was *against loss by reason of having to pay rent for a building under lease while untenable through fire loss*. On the same building the owner had insurance against loss of rent and the contest arose between the two different sets of insurers. Without discussing certain peculiarities of fact and of law there arising, it was shown that after the fire the landlord and tenant had agreed upon the tearing down of the building and the placing upon the premises of a new structure which in part covered the area of the old and in addition a much larger area at a largely increased rental. The lessee's insurer contended that the landlord owner had been paid the loss by his insurers and that the tenant having agreed with the landlord for a new building, the measure of liability was the period of time elapsing between the fire and the day when the landlord entered upon the insured premises for the purpose of erection of the new building. It was decided that the tenant's insurer had nothing whatever to do with the landlord's insurer and that there was nothing in the new arrangement between the landlord and the tenant which in anywise could be said to diminish the liability of the tenant's insurer and that the measure of the damage so far as the obligation to the tenant was concerned was the interval of time which, when proven, could be reasonably said to be necessary for the replacement of the original building, and since such period necessarily exceeded the time limited in the contract, the Company insuring the tenant was liable for a total loss and that any new arrangement between the landlord and tenant did not affect or control the fixing of the amount.

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In conclusion, attention is directed to the historic case of *Niblo v. Insurance Company*. The policy read to the assured on Niblo's Garden; on the proposition of the measure of damage the following copious note from the decision is taken:

The vital question in the cause is, What was that loss? The plaintiff claims first, that having a legal insurable interest in the buildings as lessee, he is entitled to recover their value as fixed by the policy. The case of *Laurent v. The Chatham Fire Insurance Company* (1 Hall's R., 41) in this court, which was cited by the plaintiff, does not sustain his position. There the assured owned the building, entire. The landlord had no interest whatever in the property insured. In this case, the buildings were the exclusive property of Van Rennselaer's devisees, and the interest of the assured was merely his right to possess and occupy them for the unexpired portion of the year for which they were demised.

In fire insurance generally, there is nothing corresponding with the valued policies used in marine insurance, and the assured recover according to their actual loss, as established in evidence. (2 Phill. on Ins., 40, 53.) We perceive no reason for distinguishing this case from the general rule. On the contrary, it would be extravagant and dangerous to hold that the lessee of a house for a year can recover its entire value on a destruction by fire, upon a policy insuring it for its value. How it would be, if the insurer were fully apprised of the extent of his interest when they issued the policy, we are not called upon to decide.

Next, it is claimed by the plaintiff that if the extent of his interest be open to inquiry for the purpose of reducing its value, it is proper to look into the circumstances which increase the value of the property to him. And in this view he offered the testimony which was excluded at the trial. It is said that the evidence was not to show remote, uncertain or contingent profits, but to prove bargains actually made, and which were certain to produce gains to the extent of the insurance by the use of the tenements to the end of the term, if the buildings endured to that time.

The point urged is plausible; but it is not to be disguised that it leads to the admission of proof of gains and profits interrupted and cut off in every case where the tenement insured is occupied for business purposes, and the injury to the building itself or to the interest of the assured therein is less than the sum insured.

We have no hesitation in saying that on an insurance against loss or damage by fire on a building, simply, and its injury or destruction by the peril insured against, the assured cannot recover for his loss, occasioned by the interruption or destruction of his business carried on in such building, nor for any gains or profits which were morally certain to ensue to him if it had remained uninjured to the expiration of his policy.

It is undoubtedly true that profits may be insured; but they must be insured as such; so that the underwriters may know with what subject they are dealing. (See 1 Phill. on Ins., 122, 191.) This policy is upon certain buildings. It agrees to make good to the assured such loss or damage as shall happen by fire to the property specified; not the damage which shall happen to the plaintiff by reason of the interruption of his business, nor to the gains which he would make in those buildings if they remained unharmed. The policy prescribes that the loss shall be estimated according to the true and actual cash value of the property insured, at the time of the fire; (limited of course by the extent of the interest of the assured;) and in the proof of loss, the assured is to make oath of the cash value of the subject insured. Thus, besides its silence as to everything aside from the buildings as such, the policy is inconsistent with the supposition that anything else is insured. And finally, the tenth condition annexed, giving to the insurers the option to repair or

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rebuild, cannot be reconciled with the plaintiff's claim for damages growing out of the interrupted use and enjoyment of the premises.

Our conclusions from the good sense of the contract are sustained by a decision of the King's Bench, in England, and by the opinion of this Court pronounced in the first year of its existence.

In *Wright v. Sun Fire Office* (3 Nev. & Mann. 819; S. C. 1 Ad. & Ell. 621), the policy insured £1,000 "on his interest only in the Ship Inn and offices." The premises being injured by fire, the insurer reinstated them pursuant to the policy. The assured then claimed to recover for the rent paid in the meantime, the hire of other houses, &c., while the inn was being repaired, and the loss or damage sustained by him by reason of various persons declining to go to the Ship Inn while it was undergoing such repairs. The cause was submitted to an arbitrator under a rule of court, who awarded to the assured £450 for the loss he had sustained in his business as an innkeeper by not being able to occupy the inn and offices during the interval between the fire and the rebuilding of the premises. On a rule nisi to set aside the award, it was contended by the assured that the interest which he had in the inn consisted in the power to use it in his business as an innkeeper, and the loss by temporary inability to use the inn was within the meaning of the policy; and the loss of business by reason of his not being able to use the premises would be equally within the policy. That the profits from the use of the inn were an insurable interest, and the nature of the interest of the insured in the subject-matter may be left at large, if the subject be properly described.

The Court held that the policy did not cover the profits of the business, or the loss sustained in his business, by the assured being unable to occupy the premises; and that profits, when insurable, must be insured as profits, and are not recoverable as an incidental loss under the insurance of a building.

The argument of Chief Justice Jones, in the case of *Laurent* is elaborate and satisfactory to show that as it is the tenement upon which the insurance is made; so the actual value of the tenement, as a building, is the loss of the assured, on its destruction by fire; that however unproductive the property may be, or however great may be the extent of the revenue derived from it, the measure of indemnity in case of loss is simply its value as a building.

The plaintiff, in conclusion, insisted on a return of the premiums paid from the outset, if it were held that he had no insurable interest in the buildings. As to this, we have already declared our opinion that he had an insurable interest as tenant; and that being so, there can be no return of premium.

There is nothing before us by which we can adjust the extent of his interest covered by the policy; and there must be a new trial to ascertain the same, unless the parties will agree upon some amount to be taken as the verdict of a jury, assessing his damages for such value. On the principle we have established, there can be no allowance for the loss of his business or interrupted gains; but merely for the value of the tenements for occupation, subject to the rent. One mode of putting the inquiry to the jury would be this: How much would a stranger, having no contracts or engagements pending, such as the plaintiffs offered to prove, have given for the unexpired lease when the fire occurred? There may be other modes of stating the inquiry, equally proper, but we will not attempt to anticipate them. We recommend the parties to agree, in order to save the expense of another trial.

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XXXIX USE AND OCCUPANCY

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One would naturally suppose that there are abundant words in the English language to express any desired meaning in comprehensible terms, yet when one undertakes to interpret the meaning of some of the use and occupancy forms now in use, it would seem that such is not the case. The wording of these forms is at times so ambiguous that they are subject to two or more interpretations. At other times, while there may be no ambiguity, the language used so inadequately expresses the intent of the designers of the form, that the results obtained are frequently inequitable. Such forms, if literally applied, would be liable to overpay or underpay a loss, whereas the intent of any contract of insurance is to indemnify assured for actual loss sustained, subject, of course, to the conditions of co-insurance or other qualifying clauses. The language used to express intent should therefore define such intent in terms so adequate and so free from ambiguity, that no occasion for controversy would arise in its interpretation. Otherwise, the forms are liable to be susceptible of different construction and lead to wrangles and vexatious delays, to which the assured should not be subjected.

Take, for example, the following form, which provides under Condition No. 1:

It is understood that the term "use and occupancy" shall be construed to mean **net annual profits**, etc., and such fixed charges which may not be discontinued during partial or total suspension of operations.

Condition No. 2:

That if fire occurs during the term of the policy which entirely prevents production, the company shall be liable for **actual loss sustained** at a rate not exceeding 1/300 of the amount of the policy per day for each working day of such prevention.

Condition No. 3:

That if by fire occurring during the term of the policy the ability to produce the **full daily average production** be impaired only, then shall the company be liable per day for the **actual loss sustained** in such proportion of a sum not exceeding 1/300 of the amount of the policy as the product so prevented from being produced bears to the **full daily average product**, it being understood and agreed that for the purpose of the insurance the average daily product for the twelve months next preceding the date of the fire will be considered the **full daily average product**.

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Condition No. 1 states it is understood that the term "use and occupancy" shall be construed to mean **net annual profits**, etc. Does the reference to "net annual profits" mean the net annual profits for twelve months next preceding the fire; that is, if the assured should be unable to operate as a result of fire for, say, four months, the average profits for the twelve months next preceding the fire should be determined and that rate of profit applied to the four months' period of suspension? Probably the reference to "net annual profits" and all of Condition No. 1 is simply meant to be descriptive of the subject of insurance. If, however, the reference to "net annual profits" is intended to mean that loss shall be settled on the basis of the profits for the twelve months next preceding the fire, all that would be necessary to do to determine loss of profits would be to ascertain the average net profits for the twelve months next preceding the fire and apply that rate of profit to the period of suspension, which would have the effect of making the form valued in respect to profits, in the sense that the form provides that the loss shall be predicated on the profits for the twelve months next preceding the fire, whatever found to be, without regard to what they would have been had no loss been sustained.

Condition No. 2 states that in the event of total suspension, the company shall be liable for **actual loss sustained**, not exceeding the stated daily limit of liability, so that if assured could show that during the period of suspension his net profits, etc., would have exceeded what they had averaged for the twelve months preceding the fire, he could collect on basis of actual loss sustained up to the daily limit of liability.

Condition No. 3 also provides that in the event of partial suspension the company shall be liable for **actual loss sustained**. It might, however, not so operate in effect, as it seems to be modified by the provision that the denominator of the fraction for measuring the loss of net profits and overhead shall be the average daily product for the twelve months next preceding the fire, while the numerator of the fraction is the "product so prevented" and the third item to be reckoned with is "a sum" not exceeding the daily limit of liability stated in the form; that is, the company's liability is determined by three factors, namely:

Product so prevented		
Average production of previous year	of	"a sum" not exceeding the daily limit of liability.

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None of those factors appear to have a direct relation to actual loss sustained. As a matter of fact, it would seem to be unnecessary to determine the actual loss, for the reason that it seems to have no bearing on the amount of the company's liability. Therefore, the yardstick required for measuring a partial loss under a literal interpretation of the form would appear not to be the same as would be required to measure the company's liability in case of total suspension. While in some cases there may be no particular objection to the employment of these different methods in the measurement of total and partial losses, the form would be clarified by omitting the reference to "actual loss sustained" in the clause dealing with the measurement of partial losses, for the reason, as has been pointed out, that the company's liability would be determined without direct relation to the actual loss sustained.

In connection with the words "It being understood and agreed that for the purpose of this insurance the average daily product for the twelve months next preceding the date of fire will be considered the full daily average product," the question sometimes arises as to whether the reference to the product for the twelve months next preceding the fire is intended solely to apply to the denominator of the fraction by which a partial loss is measured, or it is designed to fix in advance the full daily average product either in event of total or partial suspension. If the latter supposition is the correct one, an assured might suffer an impairment of production and still be able to produce more than the average daily product for the twelve months next preceding the fire, in which event he would not be able to collect from his insurers. On the other hand, an assured might suffer little or no actual impairment of production as a result of fire and yet, by reason of a decrease in volume of business, his production might fall far short of that of the previous year, and his loss would be measured by the amount by which his production fell short of the average for the previous year, which might be considerably in excess of his actual impairment of production, thereby giving the assured an unfair advantage in the adjustment.

Some forms undertake to clear up this ambiguity by stating that "It is understood and agreed that for the purpose of this insurance, whether involving total or partial prevention, the average daily product for the 300 days next preceding the date of fire shall be considered 'the full daily average product.'" While the addition of the words whether involving total or partial preven-

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tion may eliminate to some extent the ambiguity, the possibilities of an inequitable adjustment still remain.

Aside from the ambiguity of the form, it has the usual features which any form has which contains a prior measuring period, and especially a long period; that is, say, for example, that the product is coal, that the average production for the twelve months next preceding the fire were 1,000 tons per day, that the output would have increased to 2,000 tons per day during the period of suspension, and that the impairment of production were 50 percent, or 1,000 tons, the fraction for measuring the loss would be $1,000/1,000$ of a sum to be found, not exceeding the daily limit named in the policy, thereby giving the assured a 100 percent recovery for a 50 percent shutdown. If the production would have decreased during the period of impairment to 500 tons per day had no fire occurred, and the impairment of production were 50 percent, or 250 tons per day, the assured could recover for a 50 percent shutdown but 25 percent of "a sum", etc., which sum might be the full daily limit stated in the form, or it might, of course, be less.

When property insurance carries a co-insurance clause, the values are taken into account as they exist at time of fire. Should not use and occupancy insurance likewise be predicated on use and occupancy values as they were found to be at the time of impairment rather than on some prior period, if the full co-insurance feature is to be kept intact?

Many forms in present use contain a provision somewhat as follows:

It is a condition of this insurance that the daily production (or business) at the time of fire shall be based upon the average daily production (or business) of all plants or properties herein described for the.....days of full operation next preceding the fire.

It will be observed that a space is left before the word "days" for the purpose of filling in the period prior to the fire which shall be taken as the basis for measuring the loss during the period of suspension.

The words "based upon" referred to in the form might be susceptible of a different meaning than they were intended to have, as one definition of base is "The point or line from which a start is made"; another, "A point or line from which a start is made in any action or operation." If the reference to daily production for the period preceding the fire simply means a starting point, may it not be built up from that point until the actual daily production

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at the time of the fire is reached? If such construction were placed upon the words "based upon," the denominator of the fraction for measuring the loss would not be dependent upon the daily production for a stated period preceding the fire but a variable amount subject to determination. It was probably intended that the words "based upon" should have the effect of "fixed at", as if the authors of the form had intended that "based upon" simply meant that they were to be construed as a starting point to be built up from, they would no doubt have provided for no prior period as a basis for measuring the loss. If, however, the words "based upon" were to have the effect of "fixed at", it would have been better to have made the words incapable of controversy by using the words "fixed at" or the words "considered to be".

Some forms make reference to "prevention", "producing ability", "production", etc. Those words are susceptible of such indefinite construction that when loss occurs, assured sometimes interprets them to mean "sales"; at other times, "weight"; again, "profit", and further, "cost", according apparently to which term would avail them the greatest recovery. It will be apparent that there would be a marked difference in the amount of the company's liability whether they were held to have one meaning or another, as in a certain adjustment the ratio of loss was found to be on sales approximately 42 percent, weight 35 percent, profit 85 percent, and cost 30 percent; and the percentage of loss to insurance on those respective bases about 6 percent, 5 percent, 12 percent and 4 percent. It would be reasonable to presume that when the insurance is taken out assured estimates what their approximate daily loss would be in the event of fire on a particular basis; that is, on basis of net profits, production, sales, weight, cost, or otherwise. On whatever basis it is desired the insurance shall be predicated, the form should make it plain on what basis the company assumes liability. Generally speaking, it should be presumed that when reference is made in a form to "prevention", "producing ability", "production", or like terms, they have reference to the particular thing that assured manufactures, but from the different constructions placed upon such words when the loss occurs, the form should make it plain as to exactly what they do mean.

Other forms now more or less in use read somewhat as follows:

During the time of total suspension of business, liability under this policy shall not exceed \$..... per day for each business day of such suspension from.....to the following....., both dates inclusive.

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Agents almost invariably fill in the dates of commencement and expiration in the two blank spaces, thereby fixing the limit of liability during the term of the policy only. The forms provide, however, that the company's liability is not limited to the date of expiration so long as the fire occurs during the life of the policy, and the question therefore may arise as to what is the daily limit of liability for suspension of business extending beyond the expiration of the policy. While there is no question as to the intent of the form, an assured might, perhaps, feel warranted in claiming recovery on a higher amount of daily limit of liability than stated in the form if his use and occupancy loss extended beyond that limit. As a matter of fact, there would appear to be no occasion to use a clause with dates to be inserted where the daily limit is intended to remain a fixed amount during the entire period of liability. If, however, it is desired to provide for a fluctuating daily limit on property where production normally varies according to season, it is customary for the form to read somewhat as follows:

For each business day from.....to the following..... \$.....

For each business day from.....to the following..... \$.....,etc.

For reasons outlined above, care should be taken to see that the year is not stated in the blank spaces, the month and day only to be inserted. It will be found of some assistance to agents and others to have the words "Insert month and day only" printed in small type underneath the blank spaces in this form, such, for example, as:

For each business day from.....

(Insert month and day only.)

to noon the following.....

(Insert month and day only.)

It is not uncommon to come across forms assuming liability for use and occupancy loss resulting from destruction or damage to the buildings, machinery or stock described, the form also containing a clause providing that the compensation shall extend from the date of fire to such time as may with due diligence, etc., be required for **above described property** to be restored to same condition as immediately preceding the fire. The inclusion of stock in a form of this character without any qualification as to whether it is raw, in process, or finished, should be undesirable if the company did not desire to assume liability for time necessary to reproduce stock in process of manufacture, or finished stock. It is not difficult to conceive of a loss under this form where the property damage is confined largely to finished stock and stock in process

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of manufacture, there being but little damage to the buildings or machinery. The damage to the buildings and machinery could be restored in, say, twenty-four hours and full operation of the plant resumed, yet, according to the form, the company would be liable for the time required to restore the damaged stock to the same condition as immediately preceding the fire, for which a month or more might be required. If, however, the company should desire to assume liability for the time required to replace damaged stock, it should be borne in mind that the property insurance would pay for the damage to the stock, including cost of manufacture up to the date of the fire; further, that the fixed charges, or expenses which cannot be discontinued in event of fire, are a part of the cost of manufacture and are included in the adjustment of the property loss. The fixed charges paid for by the property insurance would cover the average time which had been spent to bring the damaged stock up to the state of completion at time of fire, and under ordinary conditions it would require approximately the same period for the restoration of similar stock after the fire to the same degree of completion. While the loss of profits is not involved in the adjustment of the property insurance, the assured would be able to recover double indemnity if he collected under his use and occupancy policies the fixed charges, etc., which were also paid by the property insurance.

From the foregoing, it would appear that where forms assume liability for time required to replace or restore stock, they should provide that the company's liability for **fixed charges** should be limited to the time the plant is totally or partially inoperative, and in no event to extend to the time required to replace damaged stock following the restoration of full operation of the plant.

Many of the earlier forms, as well as some of the current ones, provide that, in the event of partial suspension, the company shall be liable for that proportion of "a sum", not exceeding 1/300 part of the insurance, as the product so prevented bears to the full daily average product for a specified prior period. The somewhat indefinite and unsatisfactory phrase "a sum" is gradually being superseded by the words "the per diem liability which would have been incurred by a total suspension of business"—relieving the form of any doubt as to the actual meaning of "a sum".

Also where forms formerly provided for the measurement of a partial loss by "product", some of the more modern forms provide for the measurement "as the value of product so prevented, etc.,

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bears to the value of average daily product for the..... days preceding the fire", thereby somewhat more clearly defining the meaning of "product" by suggesting that the product shall be reduced to a cash value basis, which simplifies the measurement of a loss where a miscellaneous stock of different standards of measurement are involved, which would not eliminate, however, the question to which reference has heretofore been made, of whether "product" and similar terms mean profits, sales, cost or weight, etc.

There is an increasing demand for insurance covering such fixed charges and expenses as cannot be discontinued in the event of interruption of business as the result of fire. This applies more particularly to new manufacturing plants and mercantile lines, but occasionally to established lines of business where full use and occupancy protection is not desired. Sometimes it is undertaken to give the assured that protection under a use and occupancy form by striking out the reference therein to net profits, leaving the form unamended otherwise. A use and occupancy form amended only in that respect is hardly suitable, as numerous other changes would also be necessary to make the form appropriate.

Occasionally a form is designed to cover fixed charges and expenses which provides that the company shall contribute on basis as fixed charges and expenses which must necessarily continue bear to what they would have been had no loss been sustained. That would have practically the effect of making the company liable for the full daily limit of liability where the suspension of business might be trivial, as in case of a very slight reduction of business, it would probably be found that practically the whole amount of fixed charges and expenses would have to be kept up, thereby causing the company, in almost all cases of partial loss, to be liable for the full daily limit of liability; that is, say, for example, fixed charges and expenses had no fire occurred would have run \$100 per day and a slight fire caused a reduction in business of but 5 percent. Fixed charges and expenses which could not be discontinued would probably run about normal, or \$100 per day, and assured recover 100/100, or 100 percent of the company's daily limit of liability, for a 5 percent suspension of business. As the assured should be able to collect for no fixed charges and expenses which could be utilized in carrying on his business, it would be better to predicate the liability for fixed charges and expenses insurance on basis of reduction of business, under a form providing somewhat as follows:

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Total Suspension: During the time of total suspension of business, liability under this policy shall be limited to such fixed charges and expenses as cannot be discontinued, not exceeding \$..... for each business day of such suspension.

Partial Suspension: During the time of partial suspension of business, the per diem liability under this policy for such fixed charges and expenses as cannot be discontinued shall not exceed such proportion of the per diem liability which would have been incurred by a total suspension which the decrease in business bears to the full daily business at the time of fire.

It is a condition of this insurance that the daily business at the time of fire shall be considered the average daily business of all plants or properties herein described for the.....days of full operation next preceding the fire.

Other Location Clause: It is a condition of this insurance that as soon as practicable after any loss, the assured shall resume complete or partial operation of the property herein described, and shall make use of other property, if obtainable, if by so doing the impairment of business resulting from the fire may thereby be reduced, in which event the company shall be liable for not exceeding such proportion of the per diem liability which would have been incurred by a total suspension which the decrease in net profits bears to the full daily net profits for the.....days of full operation next preceding the fire.

If business could be conducted in part at the new location, with no greater proportionate expense than at the original location, it would no doubt be fairly equitable to base the adjustment on impairment of product. When it is borne in mind, however, that assured may do a business of, say, 50 percent of normal at the temporary location, yet owing to increased expenses his net profits may sink, say, to 25 percent of normal or less, it would appear to be more equitable to predicate the company's liability for loss of fixed charges at the temporary location in proportion as the impairment of net profit bears to the full normal profit at the original location, instead of on basis of reduction of "business."

While the foregoing refers more particularly to a "fixed charges" form, it will also apply, in principle at least, to the "other location clause" as commonly used in connection with straight use and occupancy insurance.

It is not unusual for forms to read, in effect:

On use and occupancy of assured's premises located.....

with the following provision:

If by reason of fire the assured is prevented from carrying on his business, the company shall be liable for not exceeding \$..... per day, etc.

without the form making it clear that the company shall be liable for loss only in the event of the interruption of business being caused by fire in assured's own premises as described in the policy. If the assured obtains power for the operation of his plant from

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outside sources, or is under contract with other manufacturers to supply him with material, he might easily be prevented from carrying on his business as a result of fire at premises quite remote from his own. Liability can, of course, be assumed for interruption of assured's business by a fire occurring in other premises than his own which would affect the operation of his business, but such liability is assumed at an advanced rate, so that where it is intended that liability shall be limited to interruption caused by fire in assured's own premises only, the form should make it clear that it does not contemplate liability for loss resulting from fire in other premises.

Frequently permits taken from property damage forms are attached to use and occupancy forms, which are irrelevant or dangerous. Take, for example, a permit to cease operations, which usually simply gives permission to "cease operations for days from date hereof." It would appear desirable that under both valued and non-valued use and occupancy forms, a permit to cease operations should read about as follows:

Permission granted to cease operations for not exceeding days at any one time without notice to the company, it being understood and agreed, however, that in the event of fire occurring during the time of voluntary inoperation, this company shall be liable for no loss during the period of time hereby granted for voluntary inoperation, nor during such additional period, if any, as the property herein described would have remained voluntarily inoperative.

On the assumption that the assured might resume operations within a shorter period than granted by the permit, it could be made to read "during such time as the property herein described would have been voluntarily inoperative" instead of "during the period of time hereby granted for voluntary inoperation."

On the ground that assured might possibly sustain a loss of net profits and overhead in excess of loss which would have been sustained by reason of voluntary inoperation, which excess would probably be null in case of either a valued or non-valued form, the permit might be still further liberalized by making it read somewhat as follows:

Permission granted to cease operations for not exceeding days at any one time without notice to the company, it being understood and agreed, however, that in the event of fire occurring during the time of voluntary inoperation, this company assumes liability only for loss of net profits and overhead sustained as a result of fire in excess of the loss which would have been sustained by reason of voluntary inoperation.

The forms which have been dealt with up to this point name a fixed amount as the daily limit of liability under "this policy",

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or in the case of seasonal forms, several fixed amounts. Occasionally forms, however, contemplate other insurance where, unless care is taken, the daily limit under each policy may fluctuate with the amount of total insurance carried.

Suppose, for example, a form provides that the policy covers for \$30,000, being pro rata of the following form:

\$300,000 on use and occupancy, etc., daily limits of liability to be specified as follows:

During January to April, inclusive.....	\$ 800 per day
During May to August, inclusive.....	1,000 per day
During September to December, inclusive.....	1,200 per day

It is evident that this form contemplates total insurance to be carried of \$300,000, being an average of \$1,000 per day for 300 days, and so long as this amount of insurance is maintained, the daily limits under "this policy" of \$30,000 will be $30,000/300,000$ of the limits specified in the form, or \$80, \$100 and \$120 per day respectively for the different periods of the year, being an average for the year of \$100 per day, or $1/300$ of the face of the policy. There is, however, no warranty that the total insurance of \$300,000 will be maintained. Suppose, for example, that the total insurance at the time of the fire were found to be but one-half of the original sum, or \$150,000. There is nothing in the form which would operate to reduce the daily limits of liability so far as the total insurance is concerned. The limits of the policy in question, however, would increase to $30,000/150,000$ of the limits named in the form, or \$160, \$200 and \$240 per day instead of \$80, \$100 and \$120 respectively.

It will be noted from the foregoing that the daily limits of each policy will fluctuate according to the total amount of insurance carried. In order to obviate this unfavorable feature, it would appear desirable for the form to contain a suitable introductory clause, providing, in effect, that "this policy" shall be liable for not exceeding $30,000/300,000$ of the "following per diem amounts". Such a clause would have the effect of fixing the daily limit of the policy regardless of the total amount of insurance carried. It would not, however, contain any of the features of a co-insurance clause. Necessary provision for co-insurance should also be made by the use of a clause reading somewhat as follows:

During the time of a partial suspension of business, the per diem liability under this policy shall not exceed that proportion of the per diem liability which would have been incurred by a total suspension which the decrease in business bears to the full daily business at the time of the fire.

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Use and occupancy forms generally provide that assured shall, in the event of loss, exercise due diligence and dispatch in placing his plant in condition to resume operations, and that any structure or structures or surplus machinery, or duplicate parts, equipment or supplies, which may be owned, controlled or used by the assured, shall be used in placing the property in condition for operation. While it is incumbent upon the assured to use every reasonable means to hasten resumption of operations, he frequently expends more than would be necessary in the normal way in order that as little time as possible may be lost, for such items, for example, as temporary repairs, cost of express on machinery, etc. over freight, extra expense of and overtime of labor, and various other items, according to the necessities of his business. The assured is no doubt first prompted by his own interests to resume operations at the earliest moment possible without consideration of the cost, in order to save his trade, fulfill his contracts and keep his organization intact. Perhaps, strictly speaking, use and occupancy insurance would be liable for none of the expense so incurred, but if the assured does incur such expense and make extraordinary efforts to resume operations, it would seem reasonable for use and occupancy insurance to recognize such outlay if the use and occupancy loss would thereby be reduced below what it would otherwise have been if assured simply proceeded in a normal way.

Many use and occupancy forms provide, in respect to salaries, that liability is assumed only for the salaries of employees under contract. It is frequently found that expert and other valuable employees are not under contract and that it is necessary for assured, in order to keep his organization together and to resume operations with as little interruption as possible and to prevent them from going to competitors, to continue their salaries. It would seem reasonable, therefore, that most use and occupancy forms at least should be broad enough to include the salaries of such indispensable employees, whether under contract or not.

Most forms provide that the loss of net profits shall be measured by production. It is likely that when agents sell use and occupancy insurance, they represent to assured that it is indemnity against loss of profits, thereby giving the impression that the loss shall be measured on that basis instead of measurement by production, as many forms provide. It is true that the subject of the insurance in most cases is net profits and overhead, but, as a matter of fact, to measure a loss of net profits and overhead by production

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as against measuring it by net profits will not, as a rule, fully indemnify assured, for the reason that if, for example, assured's production is cut off, say, 50 percent, they still have to keep up a large part of their operating expense, so that while impairment of production may run 50 percent, their loss of profits might be as high as 75 percent, or even 100 percent. If both profits and production ran on an even keel, it would probably make but little, if any, difference whether the measurement were by production or by profits, but as they do not, the assured would, in most cases, be more nearly indemnified by measuring the loss of net profits by net profits. There would, however, probably be a few cases where product would be impaired to a greater percentage than profits.

Occasionally an assured will sustain damage to merchandise in storage or held in reserve, and still have sufficient undamaged stock to supply, at least temporarily, the requirements of his business and, consequently, suffer no apparent use and occupancy loss, yet will claim that although his business is not affected at the time, the reduction of his reserve stock, as a result of the fire, may at some future time cause an actual shortage, which he may be unable to replace owing to market conditions, lack of shipping facilities, or other causes.

Under certain conditions such a claim might not appear to be altogether unreasonable. At the same time, it would no doubt be exceedingly difficult for an assured to prove that such a loss would develop. In most circumstances at least, the assured could probably replace his reserve stock gradually to the same condition as immediately preceding the fire, thereby eliminating the possibility of any subsequent shortage being reasonably chargeable to the fire.

Taking everything into account, there would appear to be little warrant to consider anything in connection with a use and occupancy loss so indefinite and remote as the contingency of a loss due to shortage of material or merchandise which may not become apparent until months or years after the occurrence of a loss.

It may be of some interest to refer to a few personal experiences to show how the adjustments were made and how they should apparently have been made, in order to point out the importance of the adjuster having a good grasp of the subject, and also the importance of the forms clearly defining the subject of insurance and providing for a comprehensible basis for measurement of the loss:

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EXAMPLE No. 1.

This form provides:

It is a condition of this insurance that if the said building or machinery or stock therein shall be destroyed or so damaged by fire that the premises described are entirely prevented from producing or merchandising, this company shall be liable at the rate of one three-hundredths ($1/300$) part of the amount of this policy for each working day of such prevention, and in case the building or machinery or stock are so damaged as to prevent the making of a full daily average production or merchandising of said goods, this company shall be liable per working day for its pro rata proportion of the percentage of one three-hundredths ($1/300$) part of the amount of this policy which the production or merchandising so prevented from being made bears to the average daily production or merchandising for the twelve months of operation immediately preceding the fire but not exceeding, in either case, the amount insured.

The statement of loss was as follows:

Production or merchandising for 12 months preceding the fire (300 days)	\$7,518,147.89
Production, etc., for the period of suspension, being 3 months (75 days) following the fire	1,802,801.38
Daily average before fire	\$25,060.49
Daily average after fire	24,037.34
Daily loss	1,023.15
Insurance loss $\$1,023.15/\$25,060.49$ of \$4,166.48 (maximum insurance liability), per day	170.10
and for 75 days (being the agreed period of suspension).....	12,757.50

The assured's production per day for the 300 days before the fire was \$25,060.49, and the actual production per day for the 75 days after the fire was \$24,037.34, the adjuster calling the difference between those figures the daily loss.

Under the wording of the form one would need to know, in order to determine the reduction of production, what the assured would have produced for the 75 days following the fire had no fire occurred. The difference between what the production would have been had no fire occurred and what the assured was able to produce in their impaired condition would be the reduction in production. If the adjuster had actually found that the production per day had no fire occurred would have been \$25,060.49, and that assured actually produced per day after the fire \$24,037.34, the difference would represent the reduction in production. If the adjuster simply took the average daily production for the year preceding the fire without regard to what the production would have run during the period of impairment and called the difference the amount of the loss, we think that method would be incorrect, as the difference between \$25,060.49 and \$24,037.34 might easily have been, in part at least, the result of reduced volume of business rather than impairment due to fire. On the other hand, if the busi-

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ness had increased over the previous year and the actual daily production following the fire were found to be as shown in the proof of loss, the impairment of production due to the fire would have been more than the statement of loss showed. It would therefore be necessary, in case the adjuster undertakes to determine the impairment of production by deducting the actual production from the full normal production, to ascertain or agree upon what assured's production would have been had no fire occurred, as well as the actual production following the fire, to fix the impairment. That should be done without regard to what assured had produced during the previous year, as what they had done during the previous year simply fixes the denominator of the fraction for measuring the loss. In case the adjuster does not use the actual production figures following the fire as a means of determining the impairment of production but simply agrees that the impairment would be so-and-so, there would be no great necessity for ascertaining what the production would have been had no fire occurred.

EXAMPLE No. 2.

The form in this case states in the first paragraph:

It is understood and agreed that whenever the words use and occupancy are used in this policy it shall be construed to mean profits, fixed charges to the extent of heating, lighting, taxes, insurance, salaries and wages of employees under contract, royalties and interest on the investment of their buildings, structures, their contents, machinery and equipment of every description owned or occupied by assured for the purpose of mining coal and general merchandise;

and in the second paragraph:

The conditions of this contract of insurance are that if the said buildings or structures, their contents or equipment, or any part thereof, shall be destroyed or so damaged by fire occurring during the term of this policy that the assured are entirely prevented from operating or carrying on their business of mining coal or general merchandise, then this company shall be liable at the rate of \$1,166.67 per day of such prevention, and in the case of partial prevention, this insurance shall be liable in that proportion of the \$1,166.67 per day as the reduction in output bears to the average daily output of coal for the ninety working days of full production immediately preceding the fire.

It will be observed that the form is valued and that liability is based on assured's business of mining coal or general merchandising; and that if entirely prevented from operating or carrying on their business, the insurance shall be liable at the rate of \$1,166.67 per day of such prevention, and in case of partial prevention, in that proportion of \$1,166.67 per day, as the reduction in output bears to the average daily output of coal for the 90 working days of full production immediately preceding the fire.

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It is not necessary under a valued form to state (as this one does in the first paragraph) the items for which the insurance shall be liable, in fact, it is better not to do so, as it is liable to confuse the assured, as well as the adjuster, if he is not a past grand master in the adjustment of use and occupancy losses.

Generally speaking, if assured carries 100 percent insurance to use and occupancy value, and percentage of profit to production did not vary, the result obtained in an adjustment should be about the same whether liability is measured by net profits or production or is assumed under a valued or non-valued form, as when he takes out insurance under a valued form, he figures that in event of the total destruction of his business, his loss per day of net profits and overhead expenses would be around a certain amount and that amount is stated in the form as the fixed amount of the company's liability; whereas under a non-valued form, he figures that if he is entirely prevented from carrying on his business, his loss of net profits and overhead would probably not exceed a certain amount per day and that amount is stated in the form as the limit of the company's liability. If, however, there is a variation in production or profits, which is frequently the case, there would at times be a wide difference in the result whether the loss were measured by impairment of production or profit.

Under a non-valued form, it is, of course, necessary to recite in the form the items upon which liability is assumed, in order to determine whether the loss is less than the limit of liability stated in the form, and if such is found to be the case, that amount is the limit of the company's liability, whereas, under a valued form, it is unnecessary to ascertain whether assured has actually lost one amount or another, as the value of profits and overhead expenses is fixed in advance.

If, however, the loss should be found to be less than the limit of liability stated in the form, the company should, in equity, not be called upon to pay more than actual loss sustained, as the real intent of insurance is simply to indemnify assured for his loss and not to enable him to profit thereby.

Total insurance covering various mines.....	\$350,000.00
Limit of liability per day.....	1,166.67
Total prevention of operation 5 days, one location only being involved.	
Partial prevention 102 days.	
Date of fire, July 3, 1917.	

The adjuster measured the loss by net profits and overhead expenses, whereas it should, according to the form, have been measured by production.

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Statement of loss:

The total tonnage produced at all mines covered for the three months next preceding the fire, being the period provided by the form by which partial prevention shall be measured, was found to be.....	140,559.95 tons
Production for same period at Mine No. 1, being the one involved in the loss.....	37,639.60 tons
Net profits and overhead expenses for same period at all mines	\$188,816.55
or per day	2,097.96
Net profits and overhead expenses for same period at Mine No. 1	\$66,356.24
or per day.....	737.22
Proportion of profits at Mine No. 1, as they bore to the profits at all mines for 90 days preceding the fire, 737.22/2097.96, or.....	35.14%
During the 102 days partial prevention at Mine No. 1, the profit on operation of all mines was.....	\$322,182.09
Profit on operation at Mine No. 1 for same period.....	78,299.30
Percentage of profit at Mine No. 1 over that of all mines reduced to	24.30%
Difference, being alleged impairment of profit at Mine No. 1.....	10.84%
Summary:	
For 5 days' total shutdown at Mine No. 1, companies pay 35.14% of daily limit of liability of \$1,166.67, being, per day.....	\$409.97
or for 5 days	\$2,049.85
For the 102 days' partial suspension, companies pay 10.84% (being alleged impairment of profit as shown) of \$1,166.67, being, per day	\$124.46
or for 102 days	12,898.92
TOTAL LOSS	\$14,948.77

The adjuster assumed that the profits of mine No. 1 had no fire occurred would have shown the same ratio of increase for the period of 102 days' partial prevention as the actual percentage of increase of profit at all mines. That may or may not have been the case. No reliable information, however, is at hand from which to determine that question.

It seems to have been the assured's custom, in case of shortage of freight cars, to send such coal as could not be shipped to their crusher to be crushed for coking. The adjuster advised that during the 102 day period of partial prevention there was no impairment of actual ability to mine coal and the diminution of production was due to destruction of the crusher building and inability to obtain freight cars for shipment of coal, from which it would appear that if there had been sufficient freight cars, the production would have been normal.

As the companies insured against inability to produce coal, and as assured were able to resume normal production after the five

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days' time necessary to construct a temporary tipple, the question arises of whether there was any reduction of production for which the companies were liable beyond the five days necessary to construct the tipple. Giving assured the benefit of any doubt, however, for the 102 days for which the adjuster made an allowance, the measure of loss should have been arrived at as follows:

Production at all mines for 90 days next preceding the loss	140,559.95 tons
or per day.....	1,561.77 tons
Production at Mine No. 1 for the same period.....	37,639.60 tons
or per day	418.22 tons
The adjuster advised that the entire plant, including Mine No. 1 showed an increase of production during the 102 days after the fire of 21.7% over the average production for the 90 days next preceding the fire. Assuming that the same percentage of increase had obtained at Mine No. 1 had it been operated at full capacity, it would have produced during the 5 days' total suspension 121.7% of 418.22 tons, or per day..	
	508.97 tons
which would make the company's liability for the 5 days' total suspension 508.97/1561.77 of the limit of liability per day of \$1,166.67, or per day.....	\$380.21
and for 5 days	1,901.05
Production at Mine No. 1 for the 90 days next preceding the fire, 37,639.60 tons, or per day.....	418.22 tons
Assuming that the production at Mine No. 1, had no fire occurred, would have shown an increase of 21.7% during the 102 days' partial prevention over the average for the 90 days next preceding the fire, it would have produced 121.7% of 418.22 tons or per day	
	508.97 tons
Actual production during the 102 days after the fire 48,137.65 tons, or per day.....	471.94 tons
Difference (impairment of production) per day.....	37.03 tons
Production at all mines for 90 days next preceding the fire 140,559.95 tons or per day.....	1,561.77 tons
Then, as the form provides, the companies would pay for partial prevention that proportion of the daily limit of liability of \$1,166.67 as impairment of production bears to the average production of the entire plant during the 90 days next preceding the fire, or 37.03/1561.77 of \$1,166.67, or per day.....	
	\$ 27.66
and for 102 days	2,821.73
Summary:	
5 days' total prevention of output.....	\$1,901.05
102 days' partial prevention of output (if, in fact, there was any prevention for that period).....	2,821.73
making the liability of the companies at most.....	\$4,722.78
as against the adjuster's adjustment of.....	14,948.77
Over-adjustment	\$10,225.99

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The form appears to make it plain that the companies' liability should be determined by a certain specified fraction of the daily limit of \$1,166.67, that fraction being the impairment of production over the average production of all mines for the 90 days next preceding the fire. That provision of the form was entirely disregarded by the adjuster, who appeared to believe it to be inconsistent with the fact that the form states elsewhere that it insures against loss of profits, etc. There seems to be nothing, however, in the form which would operate to nullify the clause which provides for the measurement of the loss. The fact that the numerator and denominator of the fraction referred to are both made up of production figures is in no sense inconsistent with the fact that the form covers profits, etc., the value of which is agreed upon in advance at \$1,166.67 per day.

EXAMPLE No. 3.

This form provided:

It is understood and agreed that the term use and occupancy as herein used shall be construed to mean net profits, general maintenance to the extent of taxes, heating and lighting, legal liability of assured for royalties and salaries and wages of employees under contract as follows:

The conditions of this contract of insurance are that if any of the buildings or machinery therein shall be damaged or so destroyed by fire occurring during the term and under the conditions of this policy so that the assured are entirely prevented from producing finished goods, the liability of the insurance for said loss shall not exceed \$250 per day, being 1/300 of the amount of the insurance, and in case the said buildings or machinery therein are partially prevented from producing finished goods, the liability of the insurance for said loss shall not exceed that proportion of \$250 per day which the product so prevented from being made bears to the amount which, but for the fire, would normally have been produced.

It will be observed that this is a non-valued form and does not provide for any period prior to the fire by which the liability shall be measured, but that the liability shall be based on the production of finished goods which, but for the fire, would normally have been produced. The net product for the 9 months next preceding the fire was, however, agreed upon between the assured and adjuster as the average normal product. It will also be noted that the form refers to production of finished goods.

Total insurance, \$75,000.

Limit of liability per day, \$250.

Date of fire, October 23, 1917.

The adjustment was made on the basis of loss of profits, whereas the form provides that the loss shall be measured by prevention of production of finished goods. The adjuster properly

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determined the amount of profits, general maintenance, taxes, heating and lighting, etc., to ascertain whether the companies' liability equalled the limit of liability per day stated in the form.

Adjuster's statement of loss as follows:

Total number of tons mined from Jan. 1 to Sept. 30, 1917, being the 9 months preceding the fire, 90,498, at \$2.95.....	\$266,982.77
Average tonnage per day for that period or 225 working days	402.2
Less cost of production, including all fixed charges and depreciation of plant.....	\$ 92,103.62
Net profits for 9 months, or 225 working days, preceding the fire	\$174,879.15
Average net profits per day for same period	\$777.25
Fixed charges for same period	14,718.15
Average fixed charges per day for same period	65.38
Net profits and fixed charges for same period	\$189,597.30
Or average per day of	\$842.63
Loss as follows:	
12 full days suspension from Oct. 23 to Nov. 6, 1917, inc.; 100%, \$250 per day.....	\$ 3,000.00
58 days partial impairment from Nov. 7, 1917 to Jan. 15, 1918, inc., 37.7%, \$94.25 per day.....	5,466.50
30 days partial impairment from Jan. 16, 1918 to Feb. 20, 1918, inc., 12.55%, \$31.38 per day.....	941.40
Total cost construction of temporary tippie, chutes and equipment \$2,009.20. Companies' proportion 250/777.25 of \$2,009.20 or	646.25
Total loss	\$ 10,054.15
Note:	
The net profits on average normal daily production.....	\$ 777.25
The net profits on average actual daily production from Nov. 7, 1917, to Jan. 15, 1918 (58 working days).....	484.23
Difference	\$ 293.02
or 37.7%.	
The net profits on average normal daily production	\$ 777.25
The net profits on average actual daily production from Jan. 15, 1918 to Feb. 20, 1918 (30 working days)	679.66
Difference	\$ 97.59
or 12.55%.	
The average daily tonnage of 402.2 per day, restored Jan. 15, 1918, by use of temporary tippie and purchase and use of additional car. The only impairment from Jan. 15, 1918, to Feb. 20, 1918, was the difference in price between Run of Mine coal and graded coal, being 20c per ton on daily tonnage of 402.2 tons or, per day	
and the following additional expense over old method:	\$80.44
1 motorman, per day	\$ 4.40
1 brakeman, per day	4.25
1 tippelman, per day	3.50
6 ton motor for hauling cars across bridge, per day	5.00
Total, per day	\$17.15

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Total for balance of agreed period of temporary impairment,
per day \$97.59
or, per day, 12.55%.

The loss, according to the terms of the form, should apparently have been determined as follows:

12 days' total suspension (Oct. 23 to Nov. 6, inc.) at \$250 per day \$3,000.00

58 days' partial suspension (Nov. 7 to Jan. 15, inc.)

Number of tons mined Jan. 1 to Sept. 30, being 9 months prior to the fire (225 working days) 90,498 or 402.2 tons per day.

Adjuster advises average price of Run of Mine coal during the 58-day period, per ton \$3.068

Average price of graded coal 20c per ton more, or, per ton \$3.268

Assuming the average production for the 9 months preceding the fire would have been maintained during the 58-day period of impairment had no fire occurred, the production for the 58 days (measured by value) would have been 402.2 tons per day at \$3.268 per ton, or, per day \$1,314.39

Assuming the actual production during the 58-day period would have been 19,946.9 tons, being 343.91 tons per day, the production (measured by value) at \$3.068 per ton would be, per day \$1,055.12

Difference (or impairment of production measured by value), per day \$ 259.27

The companies would therefore pay for the 58 days (Nov. 7, to Jan. 16, inc.), as impairment in production (in dollars) bears to the production as it would have been had no fire occurred; that is 259.27/1,314.39 of \$250., or \$49.31 per day, and for 58 days \$2,859.98

From Jan. 16 to Feb. 20 (30 days) there was no impairment of production (in tons), simply impairment of 20c a ton between graded and Run of Mine coal. Probable production during the 30 days, had no fire occurred, 402.2 tons per day at \$3.268 per ton for graded coal, per day \$1,314.39

The same production (402.2 tons per day) at \$3.068 per ton for Run of Mine coal, per day \$1,233.95

Difference (or impairment of production measured by value) per day \$ 80.44

The companies would therefore pay 80.44/1,314.39 of \$250 per day, or \$15.30 per day, and for 30 days \$ 459.00

In addition, it would appear equitable for the companies to pay for a proportionate part of the cost of temporary tippie, chutes and equipment of \$2,009.20, as they no doubt reduced the loss over what it would otherwise have been. The adjuster makes the companies contribute to that item in proportion as their daily limit of liability of \$250 per day bears to assured's net profits of \$777.25 per day for the 9 months next preceding the fire, making the contribution \$646.25, whereas the companies should not apparently contribute in greater proportion than their interest of \$250 per day bears to assured's interest in both net profits and fixed charges, aggregating \$842.63 per day, the companies' liability on that basis being 250/842.63 of \$2,009.20, or \$ 596.14

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There was an additional cost of \$17.15 per day for 30 days, aggregating \$514.50, for maintenance of the temporary tipple, etc., over the old method, to which it would appear equitable for the companies to contribute but also only in proportion as the companies' interest of \$250 per day bears to assured's interest in net profits and fixed charges of \$842.63, making the companies' share 250/842.63 of \$514.50, or \$ 152.65

Summary:

12 days' total suspension (Oct. 23 to Nov. 6, inc.).....	\$3,000.00
58 days' partial suspension (Nov. 7 to Jan. 15, inc.).....	2,859.98
30 days' partial suspension (Jan. 16 to Feb. 20, inc.).....	459.00
Proportion cost temporary tipple, etc.	596.14
Proportion cost maintenance temporary tipple, etc.	152.65

Total loss	\$7,067.77
As against adjuster's figures	10,054.15

Difference	\$2,986.38
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It would appear to be necessary in this case to convert product into dollars for measurement of the loss on account of coal of different grades and values being involved.

When the numerator and denominator of the fraction which determines the measurement of the claim both represent equal standards as to material, quality, quantity and value, it would make no difference in the value of the fraction whether the figures of which it is composed represent number of tons or their value. Suppose, however, an assured, instead of producing coal, had been a manufacturer of a variety of articles, some of which were measured by the dozen, some by barrels, others by pounds, bushels, bales, or other standards of measurement. The only way a percentage of impairment of production could be determined in such a case would be on a *cash value basis*. In the case of coal, it would be no more reasonable to use for the numerator coal of one grade and value, and for the denominator coal of a different grade and value, than it would be to measure the impairment of production of a miscellaneous stock by number of bushels over number of pounds.

EXAMPLE No. 4.

This form read on the "use and occupancy of assured's plant."

The conditions of this contract of insurance are that if the plant or any of its constituent parts or machinery or supplies or material in or on premises shall be so disabled, damaged or destroyed by fire occurring during the term and under the conditions of this policy that assured are or would be entirely prevented from producing its output, the companies shall be liable for an amount of not exceeding \$3,500 per day for each working day of such prevention; but if the ability to produce its output be diminished only, then shall the companies be liable for that proportion of \$3,500 per day in which such output is or would be dimin-

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ished; that in case of fire the average daily output for 300 actual operating days immediately preceding the fire shall, for the purposes of the policy, be assumed to be the normal daily output.

Total insurance \$1,050,000.

Date of fire, November 1, 1917.

Period of impairment, 1 day.

The form limits liability for total prevention of output to an amount not exceeding \$3,500 per day, making it non-valued as to total prevention, but for partial prevention, states the companies shall be liable for that proportion of \$3,500 per day in which the output is diminished, instead of not exceeding \$3,500, making the form valued as to partial prevention, thereby destroying the co-insurance value of the form in case of partial loss.

Statement of loss as follows:

Number of cars produced during 12 months previous to November 1, 1917	9,591
Average production of cars per day based on year's business previous to the fire	32
Total suspension of output of cars due to fire, (1 day)	50
Allowance made on 32 cars at average profit of \$95.06¼ per car, loss	\$3,042.00
The adjuster found that the average number of cars made per day for the 300 days next preceding the fire was 32, and apparently took that part of the form which states the average daily output for 300 days preceding the fire shall, for the purpose of this insurance, be assumed to be the normal daily output, to mean that the companies' liability is limited to 32 cars per day, whether assured was making more cars per day at time of fire.	
Under the term of the form assured's loss was 50 cars at average profit of \$95.06¼, or	\$4,753.12
The daily limit of liability being but	\$3,500.00
The companies should pay that amount as against the adjuster's figures of	\$3,042.00

EXAMPLE No. 5.

This form reads:

This contract of insurance guarantees the assured the full use and efficiency of their plant, occupied for manufacturing cotton and woolen waste, against any losses and the consequent interruptions of business caused by either fire or lightning or both under terms and conditions specifically set forth as follows:

Total Interruption of Business:

(a) If the machinery or other contents of said plant or any part thereof shall be destroyed or damaged by either fire or lightning or both, occurring during the continuance of this contract, so that said assured shall be entirely prevented from producing their finished products at the said location, then the insurance shall be liable to the said assured for

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\$58.33 1-3 per day for each working day of such prevention until the full use and efficiency of the said plant is re-established; not, however, exceeding in the aggregate the sum insured under this contract.

Partial Interruption of Business:

(b) If the machinery or other contents of said plant or any part thereof, shall be destroyed or damaged by either fire or lightning or both, occurring during the continuance of this contract, so that the said assured is partially prevented from producing their finished products at the said location, then the insurance shall be liable to the said assured for an amount for each working day of such partial prevention as will be equal to the difference between the products produced under the then crippled condition and the full daily finished products, until the full use and efficiency of the said plant is re-established; not, however, exceeding in the aggregate the sum insured under this contract.

Basis of Settlement:

(c) For the purpose of adjustment under this contract, the daily product of 300 days working full time shall be considered the full use and efficiency of the said plant and the basis of settlement.

Total insurance, \$17,500.

Date of fire, August 31, 1916.

Limit of liability, \$58.33 1-3 per day for total prevention of finished products.

Valued form.

It will be observed that the partial prevention paragraph of the form makes it possible for the companies to be liable for a greater loss for partial prevention than total prevention, wherein it states the companies shall be liable for each working day of partial prevention for the difference between the product produced under crippled condition and the full daily finished product.

Statement of loss:

Total Interruption of Business:

12 days from Aug. 31 to Sept. 14, \$17,500 insurance, \$58.33 1-3 per day	\$ 700.00
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Partial Interruption of Business:

40 days, from Sept. 15 to Oct. 31. Capacity for one full working day, based on average for 6 years' record	\$106.88
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Capacity in crippled condition 1-3	35.63
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Difference (or impairment of production)	\$ 71.25
--	----------

\$17,500 insurance, \$71.25 per day for 40 days	2,850.00
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Hired motor	88.70
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Total loss	\$3,638.70
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Notwithstanding assured could have collected on basis of \$71.25 per day for partial prevention for 40 days as against \$58.33 1-3 per day for total prevention, they were good enough to let the companies off by payment for partial prevention of the limit of liability for total prevention, making the loss for 12 days total prevention at \$58.33 1-3 per day	700.00
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40 days partial prevention at \$58.33 1-3 per day	2,333.32
Hired motor	88.70
Total payment	\$3,122.02
If the form had provided, as it should have, for payment of partial loss on pro rata basis for total prevention, the liability would have been 12 days' total prevention	
40 days' partial prevention 1-3 of \$58.33 1-3	\$700.00
Hired motor	777.77
	88.70
1,566.47	
Making the penalty for a bad form, even with assured's concession	\$1,555.55

EXAMPLE NO. 6.

This form provided:

If buildings or contents, or either of them, or any part thereof, shall be destroyed or so damaged that the plant is entirely prevented from producing goods, the insurance shall be liable per day at the rate of 1/300 part of the insurance for each working day of such prevention, and in case the buildings or contents or any part thereof are so damaged as to prevent the making of a full daily average production of goods, the insurance shall be liable per day for that portion of 1/300 part of the insurance which the product so prevented from being made bears to an average daily yield; said average to be determined from the amount of goods last produced during a period of three months previous to the fire.

Total insurance, \$50,000.

Limit of liability per day, \$166.67.

Date of fire, May 16, 1917.

57 days' partial prevention.

Statement of loss showed:

Rivets cut in the months of February, March and April, three months previous to the fire, lbs.	791,444
Rivets cut in May, June and July, lbs.	634,058
Difference, lbs.	157,386
Making a loss of 78½ tons, less credit of 30 tons for 1 week shut down not the result of fire.	
Net loss, 48½ tons at 3c per pound profit	\$2,910.00
Add 10% overhead on \$2,910	291.00
Add freight on goods sent away for refinishing to save delay in resuming business	94.92
Total loss	\$3,295.92

This form is (as all use and occupancy forms should be) based upon the principle of full co-insurance, the companies agreeing to pay \$166.67 per day for total prevention, and such proportion of that amount for partial prevention as impairment bears to the full daily average product for the three months previous to the fire.

Applying the form to the production and diminution of production given in the statement of loss, the result would be as follows:

Production for the three months previous to the fire (74 working days) 791,444 lbs. or average of 10,695.2 lbs. per day.

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Reduction in production, (57 working days) 97,000 lbs. or average of 1,701.7 lbs. per day.

Limit of liability per day, \$166.67; 57 days, \$9,500.19.

Companies contribute to \$9,500.19 in such proportion as average reduction of production per day bears to full daily average production for 3 months preceding the fire; that is, 1,701.7/-10,695.2 of \$9,500.19 and pay	\$1,511.56
Add freight as per agreement	94.92

Loss	\$1,606.48
As against adjustment of	\$3,295.92

The adjustment was re-opened.

It is apparent that in the original adjustment, production of the entire plant for the three months next preceding the fire was not taken into account but simply the production of that part of the plant involved in the fire, as the readjustment showed a marked increase. The period of prevention was also increased from 57 to 63 days, the adjustment being as follows:

Production Feb. 16 to May 16, lbs.	1,081,380	
Average per day, 75 days previous to fire, lbs.		14,418
Production May 16 to July 31 (63 days' impairment), lbs.	660,156	
Average per day, 63 days or to time of full operation, lbs.		10,479
Prevention of production, lbs.		3,939
Limit of liability per day, \$166.67; 63 days, \$10,500.21.....		\$2,868.65
Liability of companies for loss, 3,939/14.418 of \$10,500.21 or		94.92
Add freight		94.92
Total loss		\$2,963.57
Original adjustment		3,295.92
Saving to companies		332.35

EXAMPLE NO. 7.

This form reads as follows:

On the use and occupancy of assured's entire property and equipment, which shall be construed to mean net annual profits plus general maintenance cost to extent of taxes, interest on bonds, mortgage indebtedness, dividends, heating and lighting, and legal liability for royalties and salaries, and such fixed charges and expenses incident to the business which may not be discontinued during partial or total suspension of operation caused by fire or lightning.

If under the terms of the preceding paragraph assured is entirely prevented from operating or carrying on their business, the companies shall be liable at a rate not exceeding 1/300 part of the insurance per day, and for impairment for actual loss in such proportion of a sum not exceeding 1/300 of the insurance as the impairment bears to the daily use and occupancy for the 12 months next preceding the date of fire.

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Total insurance, \$100,000.
 Limit of liability per day, \$333.33 1-3.
 Date of fire, October 24, 1917.
 Business of assured, public utility of supplying water and electricity,
 operating 365 days per year.
 Non-valued form.

Adjuster's statement of loss:

Net earnings 12 months immediately preceding the fire.....	\$80,500.91
Average per day, 365 days.....	220.55
Total earnings from date of fire to January 1 (68 days), being period of impairment.....	\$19,294.46
Or.....	\$283.74 per day
Assured paid for hired power from Oct. 24 to Dec. 1....	\$ 1,500.00
Incurred extraordinary expense for tem- porary and permanent repairs in main- tenance and continuance of operation from Oct. 24 to Jan. 1.....	\$11,857.17
\$2954.23 of which was for repairs to roof to which the property insurance of \$210,000 was made to contribute in pro- portion as the property insurance bore to the total property and U. & O. in- surance of \$310,000, or 21/31, making the property insurance proportion of the roof expense of \$2954.23.....	\$ 2,001.25
U. & O. insurance proportion of the ex- traordinary expense	\$ 9,855.92
Total expense chargeable to U. & O. ins.	\$11,355.92
Difference being actual net earnings during 68 day period of impairment	\$ 7,938.54
Or, per day.....	116.74
Average daily net earnings for 12 months preceding the fire.....	\$ 220.55
Average daily net earnings 68 days' partial prevention of operation	116.74
Reduction in average daily net earnings.....	\$ 103.81
Loss 68 days x 103.81.....	\$ 7,059.08
Less salvage value of material used in maintenance of plant in full operation	449.43
Loss	\$ 6,609.65
The adjuster appears to have been incorrect in his method of arriving at the impairment of net earnings, which he shows to be, per day.....	\$ 103.81
The impairment probably amounted to, per day.....	160.39
Probable average net earnings for the 68 days had no fire oc- curred, per day.....	\$ 283.74
Actual net earnings during the 68 days' impairment, per day.....	116.74
Difference, per day.....	\$ 167.00
Less salvage \$449.43 for 68 days or, per day.....	6.61
Net impairment, per day.....	\$ 160.39

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making the loss for 68 days' impairment at \$160.39 per day.....\$10,906.58
 While the assured also arrived at a loss of..... 10,906.58
 he made a claim for but..... 7,950.47

arriving at that amount by apparently misinterpreting the meaning of the words "a sum" referred to in the form. The assured evidently believed "a sum" referred to the actual amount of his loss of \$160.39 per day and figured his claim on that basis, whereas, according to our interpretation, the amount of the "sum" is \$283.74, being the amount of the companies' liability per day in the event of total suspension. It is assumed that \$283.74 per day, which was actually earned during the period of impairment, would also represent the amount of net earnings had no fire occurred, as assured made no claim for suspension of operation or loss of profits, simply for the expense of outside power and temporary repairs.

Applying the actual conditions of the form to the figures given, the result would be as follows (illustrating the danger of overpayment, with such a form, in case of an increasing volume of business):

Impairment per day.....	\$ 160.39
Average net profits per day for the 12 months next preceding the fire	220.55
Net profits per day (had no fire occurred).....	283.74
Loss 160.39/220.55 of \$283.74 or, per day.....	206.34
and for 68 days' impairment.....	14,031.12
which amount the assured might perhaps have collected had he followed the actual conditions of the form as against his actual claim of.....	
	7,950.47

The danger of overpayment of a claim for partial suspension in event of an increasing volume of business is shown by the above illustration and could probably be largely overcome by the form providing that liability for partial suspension be measured as impairment of production or profit (as the case may be) bears to the amount which, but for the fire, would normally have been produced (or earned) instead of the usual formula of impairment over average for a specified period previous to the fire.

Applied to the claim in question, the fraction impairment of profit over the profit which but for the fire would normally have been earned may be expressed as.....160.39/283.74 or about 57%

whereas the impairment over the average profits for the preceding 12 months would be 160.39/220.55 or about 72%

The first fraction represents a smaller per cent and probably more nearly approximates the actual percentage of impairment than the latter.

Whenever a plant is of a nature (as in this case) to require operation during 365 days per year, the form should provide that the insurance shall be liable at a rate not exceeding 1/365 of the insurance instead of 1/300, otherwise a policy might exhaust itself

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in about ten months, and the daily limit would appear to be too large, being $1/300$ of the sum insured instead of $1/365$.

This form states, as many forms do, that for partial prevention the insurance shall be liable for actual loss sustained in such proportion of a sum, not exceeding $1/300$ of the amount of the policy per day, as the use and occupancy so impaired bears to the full daily average use and occupancy. The reference to **such proportion of a sum** apparently means that if the companies' liability for a possible total prevention is found to be less than the limit of liability per day stated in the form, contribution to partial prevention shall be on basis of the lesser sum. For example, the limit of liability for total prevention under this form is \$333 $1/3$ per day. The full net profits for the 68 days of impairment, had no fire occurred, were found to be but \$283.74 per day. The impairment should therefore apparently be figured on that amount. If the reference to **in such proportion of a sum** means actual amount of impairment, whatever it is found to be, it would probably be better understood, as has been pointed out, for forms to state in plain terms that for partial prevention the insurance shall be liable for such proportion of whatever sum the companies would be liable for in event of total suspension as impairment bears to full daily average, not exceeding the daily limit of liability named in the form.

Summarizing the comments herein, the main features to keep foremost in mind are that forms should be based on the number of working days per year of the particular business insured; that twenty-four hours should constitute a day; that liability for partial prevention of operation should be pro rata of liability for total prevention; that if a plant is composed of more than one unit, it should be made clear that the insurance attaches to all (unless made plain it shall only cover certain parts of the plant), so that in case of loss assured, if underinsured, could not claim that the insurance was intended to apply only to the particular part sustaining loss; that the form should make it plain whether the adjustment is to be made on basis of impairment of production of goods, profits, sales, or otherwise; that in case of seasonal insurance, the daily limit of liability after expiration of the policy should not exceed the respective limits of the daily limit of liability before expiration; that where forms provide for adjustment on basis of actual loss sustained, they should so clearly provide for adjustment on that basis that no question could arise as to settlement on any other basis; that where it is intended that liability be based on production for a period

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prior to the loss, it should be made clear that the adjustment is to be so based by using, for example, the words "fixed at" or "considered to be" instead of the words "based upon;" that where the form includes time necessary to replace stock damaged or destroyed, it should be made plain whether it is intended to cover raw stock, stock in process of manufacture, or finished stock, bearing in mind that it may, in certain cases at least, be undesirable to include finished stock; that in connection with the use of the words "a sum" in respect to the daily limit of liability, a more definite term should be used; that the form should provide clearly that the company assumes liability for loss only at assured's premises, unless, of course, it is intended that liability be assumed as a result of fire at other stated locations; that when clauses are taken from property forms, the wording should be applicable to use and occupancy insurance; that where a form contains a permit to cease operations, it should provide that liability cease during such time as the plant would have remained inoperative had no fire occurred; that where a policy covers pro rata of a general form, it should provide that the daily limits of the policy remain fixed amounts regardless of the total insurance maintained; that forms should contain a co-insurance feature in respect to partial loss which would practically operate as a 100% co-insurance clause.

While use and occupancy forms have yet, perhaps, to be devised which would be ideal in every respect, there has been a marked improvement with the increasing demand for that class of insurance, but so long as forms fall short of measuring up to the necessities of each case, perhaps the ingenuity of the adjuster can supply the deficiency by seeing that substantial justice at least is accorded both the assured and the company in the adjustment.

In connection with the adjustment of use and occupancy losses, the information to be determined from assured's records as to loss of profit, etc., will necessarily differ somewhat from the data required for determining the profit in settlement of losses on property insurance covering merchandise. In arriving at the percentage of profit in connection with property losses on merchandise, it is necessary to determine the gross profit only—that is, the percentage by which the selling price of goods sold during a stated period exceeds the cost of such merchandise. Having found, for example, that assured earned a gross profit of 25% on cost of merchandise and

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that his sales for a certain period amount to, say, \$125,000, the cost of the merchandise sold can be determined by dividing the sales of \$125,000 by 125%—making the cost of the goods sold \$100,000. In the adjustment of use and occupancy losses, however, we are not directly concerned with the excess of selling price over cost (that is, the gross profit) but rather with the *net* profit, being the gross profit less all expenses. If assured's records have been accurately kept, his net profit (or loss) during any fiscal period should be indicated by the balance of his Profit and Loss Account. Theoretically, at least, the net profit could also be obtained by first finding the *gross* profit by the method used in the adjustment of property losses, and deducting therefrom all cost and expense items. It may be desirable in some cases to employ this method of arriving at net profit as a means of roughly verifying the net profit as shown by the Profit and Loss Account, in event of the profit appearing to be excessive.

Practically all the use and occupancy forms now in use provide that the company is liable, in addition to loss of net profits, for "such charges and expenses as cannot be discontinued." The adjuster should, therefore, carefully review all cost and expense items, as shown by assured's records, eliminating all expenses that could be discontinued in event of total suspension of business. As a general rule, there is little difficulty in separating the "fixed" charges or expenses from those which could be discontinued in the event of total suspension. Among the expense items which could probably be discontinued in event of total suspension of business would be wages and salaries, depreciation, bad debts, fuel, light, heat, power, rent (according, of course, to whether rent is abated under terms of lease or by agreement), and practically all miscellaneous expense. The cost and expense items which could probably not be discontinued would naturally vary, according to the nature of the business. Generally speaking, however, the so-called "fixed" charges, or expenses which could not be discontinued in event of total suspension of business, would be:

Salaries of officers and employees under contract, including possibly certain valued or expert employees whom assured desired to retain until business could be resumed,

Taxes,

Interest on indebtedness,

Royalties (according, of course, to terms of contract),

General office expense necessary to be continued, etc.

Most use and occupancy forms now in use provide that liability for *total* suspension of business shall be based on net profit plus fixed

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charges, not exceeding the stated daily limit of liability, and that in the event of *partial* suspension the liability of the company shall be determined by the fraction:

$$\frac{\text{Impairment of sales (or production)}}{\text{Full daily average sales (or production)}} \text{ of } \frac{\text{the per diem liability which would have been incurred by a total suspension.}}{1}$$

Whether the suspension of business is total or partial, it will be necessary in every case to determine from assured's records the total net profit which would have been earned, plus fixed charges which would have continued during the period of suspension if no loss had occurred. If the result is found to be in excess of the daily limit of liability, the actual figures of net profit and fixed charges are not used in the adjustment—that is, the daily limit of liability is used instead for the third term of the proportion for determining the company's liability.

While the Profit and Loss Account may generally be used as a basis for determining the net profit, the account should be carefully scrutinized and the various items verified so far as possible from other records of assured. It would be well to examine previous Profit and Loss Accounts, in order to detect any undue increase in net profit which may require explanation; also for the purpose of determining whether any items which ordinarily appear in that account had been omitted or overlooked. For example, the matter of bad debts charged to Profit and Loss Account should be carefully considered. In some cases it may be justly claimed by assured that during the latest fiscal period he was obliged to charge off an exceptionally large item which he had regarded as uncollectible for several years, having kept the account open, hoping that some returns might be realized. In such a case it would seem equitable to amend the Profit and Loss Account by charging off only a fair average of uncollectible accounts. If, on the other hand, it is found that no bad debts have been charged in the latest Profit and Loss Account, previous accounts should be examined, in order that the net profit as shown by the latest account may be reduced by a fair average of customers' accounts annually charged off as uncollectible.

After having arrived at the net profit and fixed charges during the latest fiscal period as shown by assured's records, it is necessary to determine or agree upon what the net profit and fixed charges would have been during the period of impairment following the fire, if no fire had occurred, as it must be borne in mind that in arriving at the loss which would have been incurred by total suspension, we have to deal with future rather than with past experi-

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ence. The latest Profit and Loss Account, or possibly the average result of two or more of the more recent accounts, may be used as a basis, and in order to bring the figures up or down, as the case may be, to what may reasonably have been expected during the period of impairment, due allowance should be made for recent changes in volume of business, increase or decrease in expenses, price fluctuations and general business conditions.

While what we have said applies more particularly to the adjustment of mercantile losses, the same general principles will apply to manufacturing risks.

Since writing the foregoing certain changes have been adopted in most use and occupancy forms, affecting more particularly the partial suspension clause, which now provides that:

"The per diem liability under this policy during the time of a partial suspension of business shall be limited to the 'actual loss sustained,' not exceeding that proportion of the **per diem liability** that would have been incurred by a total suspension of business which the actual **per diem loss** sustained during the time of such partial suspension bears to the per diem loss which would have been sustained by a total suspension of business for the same time of all properties described herein, due consideration being given to the experience of the business before the fire and the probable experience thereafter."

It will be observed that the amended form provides for measurement of losses involving partial suspension of business by the fraction:

$\frac{\text{Per diem loss sustained}}{\text{Per diem loss which would have been incurred by total suspension.}}$	of	$\frac{\text{Per diem liability which would have been incurred by a total suspension.}}$
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The terms of the fraction for measuring partial losses in the new forms are composed of figures representing net profit and fixed charges, whereas under the old forms the terms of the fraction were composed of figures representing sales in a mercantile risk or production in a manufacturing risk. Under the new forms the numerator of the fraction is "per diem loss sustained." In order to determine this figure, the adjuster should ascertain or agree upon how much the net profit actually earned during the period of suspension fell short of the net profit which would have been earned during the same period had no fire occurred. The denominator of the fraction is the per diem loss which would have been incurred (by assured) in the event of total suspension—that is, net profit plus fixed charges.

The denominator of the fraction represents loss which would have been incurred *by assured* in event of total suspension. The

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third term of the proportion represents per diem liability which would have been incurred *by the company* in event of total suspension. The two will be identical when the loss which would have been incurred by the assured is not greater than the per diem limit of liability named in the form. If, however, the loss which would have been incurred *by the assured* in the event of total suspension exceeds the daily limit of liability named in the form, then the daily limit is, in fact, "the per diem liability which would have been incurred *by the company* in event of total suspension," and is therefore used as the third term of the proportion. The form thus contains a pro-rata feature wherein it provides that the company's liability shall not exceed a pro-rata proportion of the daily limit of liability based on the percentage of decrease of net profit below what the net profit and fixed charges would have been had no loss occurred.

The following examples will illustrate the relative results obtained by applying the conditions of the old and new forms:

INCREASING BUSINESS

Daily limit of liability.....	\$ 1,000
Production during stated period prior to the fire.....	\$10,000 per day
Net profit and fixed charges during stated period prior to the fire	\$ 1,000 " "
Probable production during period of suspension had no fire occurred	\$15,000 " "
Probable net profit and fixed charges during period of suspension had no fire occurred.....	\$ 1,500 " "
Impairment of production due to fire.....	\$ 5,000 " "
Decrease in net profit due to fire.....	\$ 600 " "

Companies pay:

Old Form	New Form
5000/10000 of \$1,000, or \$500	600/1500 of \$1,000, or \$400

DECREASING BUSINESS

Daily limit of liability.....	\$ 1,000
Production during stated period prior to the fire.....	\$12,000 per day
Net profit and fixed charges during stated period prior to the fire	\$ 1,200 " "
Probable production during period of suspension had no fire occurred	\$ 8,000 " "
Probable net profit and fixed charges during period of suspension had no fire occurred.....	\$ 800 " "
Impairment of production due to fire.....	\$ 4,000 " "
Decrease in net profit due to fire.....	\$ 600 " "

Companies pay:

Old Form	New Form
4000/12000 of \$800, or \$266.67	600/800 of \$800, or \$600

There would appear to be two principal reasons for the greater equity and accuracy of the new forms as against the old.

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FIRST: The pro rata feature in the new forms is based on the conditions which would probably have obtained during the period of suspension rather than upon the experience of some stated prior period. In applying the pro rata clause to property losses, the pro rata feature is based on the value of the property *at the time of the fire*, rather than on the valuation at some prior date. It is equally reasonable in the adjustment of use and occupancy losses to base the pro rata provision on the business which would probably have obtained during the period of impairment rather than on the business of some prior period, as the old forms provide. The new forms are based on *use and occupancy values which could reasonably have been expected to obtain during the period of suspension had no fire occurred*. The pro rata feature is thereby kept intact, notwithstanding fluctuation in volume of business, whereas the old clause (as shown by the foregoing illustrations) is apt to overpay in the event of an increasing business and underpay in the case of a decreasing business.

SECOND: Liability under the new forms is based on the percentage of decrease of *net profit*, whereas under the old forms the basis of liability was percentage of impairment of "*business*" (that is, *production* in a manufacturing business, or *sales* in case of a mercantile risk). It frequently happens that a fire causing an impairment of production (or sales) of, say, 50%, will result in the net profits being impaired perhaps 75%, or even 100%. On the other hand, a partial suspension of operation of certain units of a manufacturing plant will under certain conditions in no way interfere with the profit-producing end of the business and cause little or no loss of net profit—the loss of physical property being covered by property insurance. Inasmuch as use and occupancy insurance is intended to afford protection against loss of net profit and fixed charges rather than decrease in production or sales, the new form would appear more equitable than the old in view of its basing liability on percentage of impairment of net profit plus fixed charges rather than percentage of impairment of sales or production.

The partial payment clause in the new form makes no direct reference to fixed charges and expenses. Fixed charges are, however, referred to elsewhere in the form and are intended to be covered by the partial suspension clause. This clause provides that liability for partial suspension shall be determined by the use of the following formula:

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<u>Per diem loss sustained</u>	of	Per diem liability which
Per diem loss which would have been incurred (by assured) in event of total suspension.		would have been incurred (by the company) in event of total suspension.

This formula is composed of three terms, each of which includes both loss of net profit and fixed charges. In arriving at the numerator of the fraction which represents the per diem loss sustained, it should be borne in mind that the decrease in net profit due to the fire will automatically include fixed charges. If, therefore, an amount is included by the adjuster in the numerator as fixed charges, in addition to the decrease in net profit due to the fire, the item of fixed charges will be included twice, thereby overpaying the loss.

Suppose, for example, that a flour mill is composed of two units, similar in every respect and each producing 50 barrels per day, making total production 100 barrels per day; that the mill normally earns a net profit of \$100 per day, being \$1.00 per barrel, each unit producing 50 barrels and earning a net profit of \$50 per day; that one of the two divisions is totally destroyed by fire, causing an impairment of production of 50%—the remaining unit continuing at full capacity and turning out 50 barrels per day as before. The output of the plant as a whole is thus reduced from 100 barrels to 50 barrels per day. If *all* expenses could be reduced by 50% following the burning of one of the two units, the remaining unit could still realize a net profit of \$1.00 per barrel, or \$50.00 per day for 50 barrels. Unfortunately, however, the entire expense cannot be reduced to 50% of normal by a 50% reduction in output, as there are certain expenses or "fixed charges" which will continue after the fire the same as before.

Let us assume that the daily business were as follows:

	Entire Plant under normal conditions	Each Unit under normal conditions	Remaining unit after the fire
Cost of raw material, plus expense which can be discontinued in event of fire	\$850	\$425	\$425
Expense which cannot be discontinued	50	25	50
Total cost	\$900	\$450	\$475
Net Profit	100	50	25
Selling price	\$1,000	\$500	\$500

If *all* expenses could be reduced 50% by the burning of one of the units, the business of the remaining unit would correspond with

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the figures in the second column above, showing net profit of \$50.00. While it is no doubt true that certain of the expense can be reduced to 50% of normal, the \$50.00 designated as fixed charges will remain as before, and the operations of the remaining unit following the fire will be as shown in the third column above, showing the net profit realized after the fire to be but \$25 per day, as against a normal profit of \$100.00 per day if no fire had occurred.

The decrease in net profit, therefore, is the difference between the net profit actually earned (\$25.00) and the net profit which but for the fire would have been earned (\$100.00 per day), or \$75.00 per day, showing a shrinkage of net profit of 75% as against a decrease in production of 50%. The assured is obliged to pay his full overhead of \$50.00 per day during the period of impairment, and still realizes a *net* profit of \$25.00 per day. He can sustain no further use and occupancy loss than \$75.00 per day, being the difference between net profit earned (\$25.00) and net profit which but for the fire would have been earned (\$100.00). The item of fixed charges has been fully taken into consideration in these figures.

The *net profit prevented from being made* is \$50.00 per day, being the net profit which but for the fire would have been earned in the burned unit. If the unit involved in the fire could be disregarded entirely, including the overhead, and the amount of net profit for the unit still in operation remaining the same as before the fire, the loss of net profit would be 50% of \$100.00, or \$50.00. However, owing to the overhead expense of \$50.00 continuing as before the fire, the assured, in addition to the prevented profit of \$50.00, will sustain further loss of the proportion of the overhead applying to the unit destroyed—that is, 50% of \$50.00, or \$25.00.

Upon analysis as above, the assured's loss of \$75.00 per day is found to be composed of:

Net profit prevented in the burned unit.....	\$50.00
Continuing fixed charges applying to the burned unit.....	25.00
Total	<u>\$75.00</u>

While the \$75.00 loss is arrived at without giving any consideration to the question of fixed charges—that is, by simply deducting net profit earned from net profit which but for the fire would have been earned—the fixed charges are as shown by the foregoing analysis *automatically*, and perhaps *unconsciously*, taken into consideration. If, therefore, an additional allowance is made for fixed charges in the numerator of the fraction, such additional allowance will be a duplication.

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The denominator of the fraction, being "Per diem loss which would have been incurred (by assured) by total suspension," should, of course, include the net profit which would have been earned, plus the fixed charges which would have been incurred during the period of suspension had no fire occurred.

The third term of the formula, being "per diem liability which would have been incurred (by the company) in event of total suspension," will include fixed charges, etc., as provided by the total suspension clause of the form, not exceeding, of course, the daily limit of liability named in the form.

The purpose of the new form is to correct the shortcomings of the old. Whether they will develop other or greater difficulties than those they are designed to remove, the future will determine.

XL FORMS—FROM THE COMPANY'S STANDPOINT

W. N. BAMENT,

General Adjuster The Home Insurance Company.

The subject of insurance forms is such an exceedingly broad one, that it will be impossible in an address such as this to do more than touch upon it in a general way, and direct attention to some of the more important forms, which, although in general use, may possess features which are not fully understood.

The best form, whether viewed from the standpoint of the insurance company or the insured, is a fair form, one which expresses in clear, unambiguous language the mutual intention of the parties, and affords no cause for surprise on the part of either, after a loss has occurred. But the preparation of such a form is not always an easy task, and it is right at this point that the ability of the broker and the underwriter come into play.

A distinguished Englishman declared that the English Constitution was the greatest production that had ever been conceived by the brain of man, but it was subjected to the most scathing criticism and violent assaults by Bentham, the great subversive critic of English law. Twenty-five years ago the New York Standard Policy was prepared by the best legal and lay talent in the insurance world, and the greatest care was taken to present not only a reasonable and fair form of contract between the insurer and the insured, but one which could be easily read and understood.

While no such extravagant claims have been made for the Standard Policy as were made for the "Matchless Constitution," it has for a quarter of a century stood the test of criticism fully as well, if not better than its most ardent friends could have reasonably expected, yet some of its more important provisions have frequently been before the courts for construction, and the various tribunals have differed radically in their decisions.

A perfect constitution and a perfect policy may therefore be safely placed in the list of things unattainable, but if there is any one who can make a nearer approach to perfection in the art of constructing a written form which will result in a maximum of loss collection with a minimum of co-insurance or other resistance than a present day broker, he has not yet been discovered.

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The ornate policies in use thirty years ago, with no uniformity in conditions, with their classification of hazards which no one could understand and their fine print which few could read, have given way to plainly printed uniform Standard Policies with materially simplified conditions. But the written portion of the insurance contract owing to our commercial and industrial growth, instead of becoming more simple, has taken exactly the opposite direction, and we now have covering under a single policy or set of policies, the entire property of a coal and mining company, the breweries, public service or traction lines of a whole city and the fixed property, rolling stock and common carrier liability of an entire railroad system involving millions of dollars and containing items numbering into the thousands. This forcibly illustrates the evolution of the policy form since the issuance of the first fire insurance contract by an American company one hundred and sixty years ago, in favor of a gentleman bearing the familiar name of John Smith, covering

"500£ on his dwelling house on the east side of King Street, between Mulberry and Sassafras, 30 feet front, 40 feet deep, brick, 9-inch party walls, three stories in height, plastered partitions, open newel bracket stairs, pent houses with board ceilings, garrets finished, three stories, painted brick kitchen, two stories in height, 15 feet 9 inches front, 19 feet 6 inches deep, dresser, shelves, wainscot closet fronts, shingling 1-5 worn."

It will be observed that in the matter of verbiage this primitive form rivals some of our present day household furniture forms and all will agree that this particular dwelling might have been covered just as effectually and indented quite as easily without such an elaborate description.

Any one who has an insurable interest in property should be permitted to have any form of contract that he is willing to pay for, provided it is not contrary to law or against public policy, and judging from a contract of insurance issued by a certain office not long ago the insuring public apparently has no difficulty in securing any kind of a policy it may desire at any price it may be willing to pay. The contract in question was one for £20,000, covering stock against loss from any cause, except theft on the part of employes, anywhere in the Western Hemisphere, on land or water, without any conditions, restrictions or limitations whatsoever, written at less than one-half the Exchange rate in the insured's place of bus-

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iness. An insurance agent upon being asked whether he thought it was good, said that if the company was anywhere near as good as the form, it was all that could be desired, but vouchsafed the opinion that it looked altogether too good to be good.

In these days we frequently find concentrated within the walls of a single structure one set of fire insurance policies covering on building, another on leasehold interest, another on rents or rental value—and in addition to this, policies for various tenants covering stock, fixtures, improvements, profits and use and occupancy, subject to the 100% average or co-insurance clause, to say nothing of steam boiler, casualty and liability insurance, thereby entirely eliminating the element of personal risk on the part of the owners, and producing a situation which will account in some measure for the 17,000 annual fire alarms and \$15,000,000 fire loss in New York City; \$230,000,000 annual fire loss in the country at large, and for the constantly increasing percentage of cases where there are two or more fires in the same building and two or more claims from the same claimant.

The most common and perhaps least understood phrase found in policies of fire insurance is what is known as the "Commission Clause," which reads "his own or held by him in trust or on commission or sold but not delivered" or "removed." This clause in one form or another has been in use for many years, and it was originally the impression of underwriters that owing to the personal nature of the insurance contract a policy thus worded would simply cover the property of the insured and his interest in the property of others, such as advances and storage charges, but the courts have disabused their minds of any such narrow interpretation and have placed such a liberal construction upon the words "held in trust" that they may be justly regarded as among the broadest in the insurance language and scarcely less comprehensive than the familiar term "for account of whom it may concern"; in fact, the principles controlling one phrase are similar to those governing the other.

It has been held that whether a merchant or bailee has assumed responsibility, or agreed to keep the property covered or whether he is legally liable or not, if his policies contain the words "held in trust," the owner may, after a fire, by merely ratifying the insurance of the bailee, appropriate that for which he paid nothing whatever and may file proofs and bring suit in his own name against the bailee's insurers. Nor is this all, for in some jurisdic-

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tions, if the bailee fails to include the loss on property of the bailor in his claim against his insurers, or if he does include it and the amount of insurance collectible is less than the total loss, the bailee may not first reimburse himself for the loss on his own goods and hold the balance in trust for the owners, but must prorate the amount actually collected with those owners who may have adopted the insurance, although, if he has a lien on any of the goods for charges or advances, this may be deducted from the proportion of insurance money due such owners.

The phrase "for account of whom it may concern" was formerly confined almost entirely to marine insurance, but in recent years there has been an increasing tendency to introduce it into policies of fire insurance.

All authorities are agreed that the interests protected by a policy containing these words must have been within the contemplation of him who took out the policy at the time it was issued. It is not necessary that he should have intended it for the benefit of some then known and particular individuals, but it would include such classes of persons as were intended to be included and who these were may be shown by parol. The owners or others intended to be covered may ratify the insurance after a loss and take the benefit of it, though ignorant of its existence at the time of the issuance of the policy, just the same as under the term "held in trust."

The words "for account of whom it may concern" are not limited in their protection to those persons who were concerned at the time the insurance was taken out, but will protect those having an insurable interest and who are concerned at the time when the loss occurs. They will cover the interest of a subsequent purchaser of a part or the whole of the property and supersede the alienation clause of the policy (U. S. S. C.), *Hagan and Martin v. Scottish Union and National Ins. Co.*, 32 Ins. Law Journal, p. 47; 186 U. S. 423.)

A contract of insurance written in the name of "John Doe & Co. for account of whom it may concern" should contain a clause reading "Loss, if any, to be adjusted with and payable to John Doe & Co.," not "loss, if any, payable to them" or "loss, if any, payable to the assured," as forms sometimes read.

Policies are frequently written in the name of a bailee covering "On merchandise, his own and on the property of others for which he is responsible," or "for which he may be liable"—and it has

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been held that the effect of these words is to limit the liability of the insurer to the loss on the assured's own goods and to his legal liability for loss on goods belonging to others, but the words "for which they are or may be liable" have been passed upon by the Supreme Court of Illinois, and they have been given an entirely different interpretation. That tribunal in the case of *Home Insurance Company v. Peoria & Pekin Union Railway Co.* (28 Insurance Law Journal, p. 289; 178 Ills. 64) decided that the words quoted were merely descriptive of the cars to be insured; that the word "liable" as used in the policy did not signify a perfected or fixed legal liability, but rather a condition out of which a legal liability might arise.

As illustrative of its position the court said that an assignor of a negotiable note may, with no incorrectness of speech, be said to be liable upon his assignment, but his obligation is not an absolute fixed legal liability but is contingent upon the financial condition of the maker; and accordingly held that the insurance company was liable for loss on all the cars in the possession of the railroad company, notwithstanding the fact that the latter was not legally liable to the owners.

In view of the exceedingly broad construction which the courts have placed upon the time honored and familiar phrases to which reference has been made, it is important for the party insured, whether it be a railroad or other transportation company, a warehouseman, a laundryman, a tailor, a commission merchant or other bailee to determine before the fire whether he desires the insurance to be so broad in its cover as to embrace not only his own property and interest, but also the property of everybody else which may happen to be in his custody; if so, he should be careful to insure for a sufficiently large amount to meet all possible co-insurance conditions, and if he wishes to make sure of being fully reimbursed for his own loss, his only safe course is to insure for the full value of all the property in his possession.

At this point the inquiry which naturally presents itself is, how should a policy be written if a merchant, warehouseman or other bailee desires to protect his own interest but not the interest of any one else? The following form is suggested: "On merchandise his own, and on his interest in and on his legal liability for property held by him in trust or on commission or on joint account with others, or sold but not removed, or on storage or for repairs, while contained, etc." This will, it is believed, limit the operation of co-in-

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insurance conditions and at the same time prevent the owners from adopting, appropriating or helping themselves to the bailee's insurance, for which they pay nothing and to which they are not equitably entitled.

Many of the household furniture forms now in use, in addition to embracing almost every conceivable kind of personal property except that specifically prohibited by the policy conditions, are also made to cover similar property belonging to any member of the family or household, visitors, guests and servants.

This form would seem to indicate considerable ingenuity on the part of the broker, broad liberality on the part of the insurance company and commendable generosity on the part of the insured, and the latter would probably feel more than compensated by being able to reimburse his guest for any fire damage he might sustain while enjoying his hospitality, but the amount of insurance carried under such a form should anticipate the possibility of his having a number of guests at one time and a corresponding increase in the value at risk.

It must be borne in mind that in localities where co-insurance conditions prevail the value of property belonging to all members of the household, guests and servants will be taken into account for co-insurance purposes in event of loss, and as guests frequently have with them wearing apparel and jewelry of considerable value, a situation might easily arise which would result in quite a large part of the loss being uncollectible.

But aside from the element of co-insurance, which is not generally applicable to household furniture risks, the fact remains that under such a form the members of the household, visitors, guests and servants are insured quite as effectually as the party specifically named as the "insured" in the policy, and by merely adopting the insurance which has been generously provided, they will have just as much right to the proceeds, to the extent of their interest, as the nominal insured, for a policy so written is controlled by the same principles as those governing property held in trust or for account of whom it may concern.

If, therefore, the insured does not desire to carry insurance for an amount sufficiently large to meet these possible contingencies, he should content himself with a less ambitious form of policy, otherwise he may under certain conditions find himself the victim of his own generosity.

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In the absence of co-insurance conditions, this broad, all-inclusive form need not give the average householder any special concern for it is highly improbable that a guest at a private residence would presume, uninvited, to avail himself of his host's insurance, although servants and members of a household who are not members of the family might not be so considerate.

It is, however, an exceedingly dangerous form for use in policies covering the contents of *quasi* public institutions, hotels and boarding houses, for it is hardly conceivable that the managers or proprietors would desire to carry and pay premium on insurance sufficient to cover the uncertain and constantly changing value of the property of their guests, especially when they are under no obligation to do so.

The question is frequently asked whether goods in bond should be covered for the value with or without the inclusion of customs duties or internal revenue tax; also whether the policy form should affirmatively include or exclude the duty or tax or make no mention of it whatever.

According to the internal revenue laws (Sections 3221 and 3223), when any distilled spirits in bond are destroyed by accidental fire or other casualty, without any fraud, collusion or negligence of the owner thereof, no tax shall be collected on such spirits so destroyed, or, if collected, it shall be refunded upon the production of satisfactory proof that the spirits were destroyed as specified in the statute. But when the owners may be indemnified against such tax by a valid claim of insurance, for a sum greater than the actual value of the distilled spirits, before and without the tax being paid, the tax shall not be remitted to the extent of such insurance. In short, the insurance would be regarded as covering the tax to that extent, and the insurance companies would have no subrogation rights. As virtually all losses on spirits in bond occur without negligence on the part of the owner, and as the statute makes the refund or cancellation of the bond mandatory, there would seem to be no necessity whatever for insuring the tax, and the usual and better practice is to affirmatively exclude it in the policy forms.

As respects duties on imports, the situation is somewhat different. According to Section 2984 of the United States Revenue Statutes, the Secretary of the Treasury is "authorized," upon production of satisfactory proof of the actual injury or destruction, in whole or in part, of any merchandise while in bond, by accidental

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fire or other casualty, to abate or refund, as the case may be, the amount of import duties paid or accruing thereupon; and, likewise to cancel any warehouse bond or bonds in whole or in part, as the case may be.

Although there is no court decision definitely passing upon the question as to whether the above provision is mandatory or whether the matter is left by the statute entirely within the discretion of the Secretary of the Treasury, it has for years been the practice of the Treasury Department to treat it as if it were mandatory, and it is practically certain that the owner of goods in a bonded warehouse would not lose anything on account of duties in event of destruction of the property by fire.

Some very good authorities entertain the opinion that it is not advisable to affirmatively exclude duties from the cover of the policies, and that in the absence of special mention of the duties in the form, the imported value, without duties, will be the basis of settlement for loss and co-insurance purposes.

All the decisions prior to the enactment of Section 2984, providing for the refund or abatement, were to the effect that as the insured was absolutely liable to pay the duties, even though the goods were destroyed, his only relief was to look to his insurers, but there does not appear to have been any decision since the enactment of said section as to its effect upon the liability of the insurers.

On the other hand, some good authorities entertain the opinion that if the insurance is sufficient in amount and the duties are not expressly excluded, it would be held to cover them, because they become an obligation immediately upon importation, and the owner is liable for them until he obtains their remission. In this view of the matter, the fact that it is more or less easy to get the duties remitted is immaterial, and it is believed by those who entertain the above opinion, that the courts would not allow the insurance company to compel the insured to reduce his claim against it by enforcing his rights against the United States Government.

This might possibly be true if the duties were already paid at the time of the fire or paid subsequently in order to secure the release of the property for salvage purposes, but in this event the insurance company would be subrogated to the rights of the insured against the Government. If, however, the property is totally destroyed and the duties remain unpaid, it is difficult to perceive how the insured can collect anything beyond the invoice value, for

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until he actually pays the duties, he sustains no loss thereon, even temporarily, and if they are remitted, he never will sustain any loss thereon.

The mere fact, however, that there has been no final court decision, and that there are differences of opinion on the subject, emphasizes the advisability of having it definitely stated in the policy form whether the duty is to be considered a part of the value insured or not; and it is also desirable to have it determined before the fire occurs by whom the duty and warehouse charges shall be paid, in event of it being necessary to remove the stock from the bonded warehouse to protect it from further damage, or for salvage or other purposes.

The following form, which is used by some companies, would seem to meet the necessities of the situation when it is desired to exclude the duty as a part of the value:

It is understood and agreed that the Custom House duties payable to the United States Government on property covered by this policy shall not be considered as part of the value insured in event of loss or damage.

It is also understood and agreed that on demand of this Company, in the event of loss, the insured shall, "to protect the property from further damage," promptly pay all government duties, warehouse and other charges necessary for the purpose of removal of said merchandise to such other location as may be designated by this Company.

In view of the statute providing for remission or abatement, and the well settled policy of the Treasury Department in interpreting it, there does not appear to be any particular necessity of insuring the duty, and to pay premium on this additional valuation would be an expense without compensating benefits commensurate with the outlay.

The question as to the proper form to use when property is sold under contract is one concerning which there is considerable misapprehension, a great many entertaining the erroneous belief that so long as the legal title remains in the vendor, he is the owner of the property and that it should be insured in his name.

Where the contract is silent upon the subject, courts differ as to whether the vendee must complete, despite the intermediate destruction of the building by fire. The English rule, followed by some other courts, is, in general, that the vendee, whether possession has been given or not, is to be regarded as the equitable owner, liable meanwhile for all losses and entitled to all benefits, if not in default under the terms of the executory contract, and that destruction of the building by fire is no bar to an action for specific

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performance of the contract of sale. But the tendency of the decisions in this country lends support to the rule that the executory contract falls at the option of the vendee, if the vendor cannot deliver the premises in substantially as good condition as when the contract was made. (Browning v. Home Ins. Co., 71 N. Y. 508; Wood v. American Fire Ins. Co., 149 N. Y. 372; Tieman v. Citizens Ins. Co., 76 App. Div. 5; O'Neill v. Franklin Fire Ins. Co., 159 App. Div. 313.)

But where the vendee has, in addition to his executory contract, and pending its fulfillment, *taken actual possession* and control of the property and is in a position to enforce specific performance, it has been quite generally held that he is the equitable or real owner of the property. It is vendible as his, chargeable as his, capable of being encumbered as his; it may be devised as his, would descend to his heirs, and while living is insurable as his. The vendor who retains the legal title simply has a lien on the property for the unpaid balance due on the contract; the substance of ownership has passed—only the shadow remains. As the vendee under these conditions can insure the property for its full value as his own, it logically follows that the vendor cannot insure it as owner, for it can hardly be maintained that there can be two sole and unconditional owners of the same property at the same time. Therefore, a New York Standard Policy which contains a stipulation against change in interest, title or possession becomes void unless properly endorsed, if the property is sold under contract and the vendee is given possession. (Sewell v. Underhill, 197 N. Y. 168, affirming s. c. 127, App. Div. 92; Sewell v. Home Ins. Co., 113 App. Div. 728, affirmed without opinion, 189 N. Y. 526.)

"When the vendee under an executory contract binds himself absolutely to complete and to take the whole title, whether of real or personal property, he is held to be the sole and unconditional owner. But where the agreement to purchase is conditional or contingent, whether of real or personal property, so that a fire loss will not fall upon the vendee, then his interest is not sufficient to satisfy the warranty as to sole and unconditional ownership. The beneficial owner of the entire property is the real owner." (Richards on Insurance, 3rd Edition, 336.)

If it is desired to protect the interest of the vendor only, it can be done by issuing policy in his name, but it is absolutely necessary to state therein that the property has been sold under contract

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or that a bond has been given for a deed. The only interest the vendor has left to protect is that of a vendor's lien (an interest somewhat similar to that of a mortgagee), and upon payment of the loss, which cannot exceed the unpaid balance due on the contract, the insurance company will be subrogated to the extent of the amount paid.

If it is desired to protect the interest of the vendee only, the policy should be issued in his name just as if he also held the legal title. It is customary to state in the policy form that he holds a bond for a deed or a contract of purchase, although under a New York Standard Policy this would hardly seem to be necessary.

If it is desired to protect the interest of both vendor and vendee it can be done by issuing the policy in the names of both and stating therein that the property has been sold under contract by one to the other, and making loss, if any, payable as their respective interests may appear.

A policy issued to the vendor setting forth the fact that the property has been sold under contract to the vendee (naming him) and making loss if any payable to each as their respective interests may appear, would probably be held to indicate an intention to cover both interests, although this is getting the cart before the horse and would be analogous to issuing a policy in the name of the mortgagee with loss if any payable to the mortgagor. If both interests are intended to be covered the policy should so state.

A policy issued in the name of the vendee in possession, with loss if any payable to the vendor, as his interest may appear, with a mortgagee clause attached, is probably the best protection that the latter can possibly have.

The law in Maine is a notable exception to the general rule. In that state, even if the vendee be in possession, if the building is destroyed by fire the vendee cannot be compelled to take a deed of the land alone and pay the purchase money. *Gould v. Murch*, 79 Me., 288.

In Georgia, by reason of the "Georgia Loan Deed" statute, when the property has been sold under contract, neither the vendor nor vendee is deemed the sole and unconditional owner of the property; hence it is absolutely necessary that the interest to be insured be fully set forth in the form. *Orient Ins. Co. v. Williamson*, 98 Ga., 464; *Williamson v. Orient Ins. Co.*, 100 Ga., 791; *Palatine Ins. Co. v. Dickenson*, 116 Ga., 794; *Athens Mut. Ins. Co. v. Evans*, 132 Ga., 703.

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Some forms contain a stipulation that the policy shall not be invalidated if contracts for sale of the property are executed and delivered. This will save the policy from forfeiture, but it will only cover the remaining interest of the vendor.

Several years ago the Uniform Bill of Lading was adopted by railroads and other transportation companies, with the endorsement of the Interstate Commerce Commission acting in an advisory capacity. The only provision therein of special interest to insurance companies reads as follows: "Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance." The insertion of the closing words of this last paragraph was secured through the efforts of marine underwriters, who lost no time in preparing suitable clauses to counteract the effect of the insurance provision.

From the various warranties prepared by marine companies to meet the situation, the following have been selected:

Warranted by the insured free from any liability for merchandise in the possession of any carrier or other bailee who may be liable for any loss or damage thereto, and any stipulation or agreement that such carrier or bailee shall have the benefit of this insurance, shall void this policy or contract of insurance.

also,

Warranted by the assured free from any liability for merchandise in the possession of any carrier or other bailee, who may be liable for any loss or damage thereto; and free from any liability for merchandise shipped under a Bill of Lading containing a stipulation that the carrier may have the benefit of any insurance thereon; and that any insurance against fire granted herein shall not cover where the assured or any carrier or other bailee has fire insurance which would attach if this policy had not been issued.

Fire insurance companies have apparently taken no action toward protecting themselves in this direction, and unless they do so the insurance issued by them will inure to the benefit of the carrier. Although the Supreme Judicial Court of Maine in the case of *Dyer v. Maine Central R. R. Co.* (99 Me. 195) held that an insurance provision in the statute of that State in favor of a railroad company will not deprive an insurance company of its subrogation rights in event of negligence, the Supreme Judicial Court of Massachusetts, in a recent decision under a similar statute, held to a contrary doctrine; *New England Box Co. v. N. Y. C. & H. R. R. Co.* (41 Ins. Law Journal, p. 517; 99 N. E. Rep. 140). And the United States Supreme Court has held that a stipulation in a bill of lading

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that the carrier shall have the benefit of any insurance on the goods is a valid one, and in such a case, even though the loss be occasioned by the negligence of the carrier, the insurance company cannot be subrogated to the rights of the shipper to recover damages for such negligence; *Phoenix Ins. Co. v. Erie & Western Transportation Co.* (15 *Ins. Law Journal*, p. 574; 117 U. S. 312).

The recent action of the New York Insurance Exchange in abrogating the old pattern clause and requiring patterns, models, moulds, matrices, drawings, designs, dies, solutions, photographic negatives or lithographic plates or stones or engravings thereon to be specifically insured, and in preparing a clause precluding the possibility of their being covered by general terms under other items of the policy, was a move in the right direction, and the rule should be universally adopted not only as a matter of sound underwriting practice, but in the interest of convenience in adjustments and as a matter of simple fairness between the insured and the company. All of the articles mentioned are of uncertain value and belong in a class by themselves; and to include them with machinery and fixtures, the value of which is easily ascertainable, invariably complicates the adjustment, especially when the policies contain the full co-insurance clause with no limit on the articles in question, for the oldest adjuster present never heard of a poor horse (covered by insurance) ever being killed by lightning or a dead pattern ever being destroyed by fire.

A case is now pending in a distant city under the following conditions: blanket policies were issued for over \$150,000, with full co-insurance clause, and no limit on patterns. A comparatively small fire occurred in the basement of one building belonging to the plant which was used for the storage of patterns and drawings. If the fire had occurred in some other part of the plant, the probabilities are that, in figuring value for purposes of co-insurance, the basement of the burned building would have been regarded as a sort of pattern cemetery, but through the revivifying influence of the fire the patterns and drawings therein instantaneously assumed a valuation of about \$50,000, or about one-third the value of the entire plant and contents.

In naming a specific amount on patterns and drawings, the company knows just what it is doing and just what to expect; in insuring them blanket without limit, it ought to know from experience what to expect, although it does not know just what it is doing.

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The precaution taken by the framers of the pattern clause to avoid having patterns and other kindred articles covered by general terms in other items of the policy, directs attention to the fact that in preparing any kind of form, special care should be taken to have each item embrace exactly the property intended to be protected by it, and neither by general nor specific terms have the same property covered under more than one item. As there are a number of exceedingly broad general terms such as "supplies," "appurtenances," etc., they should be used exactly where intended and not elsewhere.

Among the new elements which have been introduced into policies of fire insurance during the past thirty years, by far the most important is that of co-insurance, which has its practical manifestation in various forms familiarly known as the "eighty percent co-insurance clause," "the percentage average clause" and the "reduced rate contribution clause." Co-insurance is fundamentally sound in principle and an absolutely necessary factor as an equalizer of rates; and although by some strange providence it almost invariably happens that the relative sound value of property saved is much less than that destroyed, yet the co-insurance or average clause, by maintaining a proper relation between sound value and loss, operates in a large measure as a kind of automatic regulator in loss adjustments.

Co-insurance, or average conditions, if a proper amount of insurance be carried, are in themselves perfectly harmless, but if used in connection with the average distribution clause, special care should be taken by the insured or his broker to see that all policies are strictly concurrent and that all contain the average distribution clause, for if some contain the clause and others do not, the insured may be compelled to stand a portion of the loss himself, notwithstanding the fact that the aggregate insurance may exceed the aggregate value. All the policies should contain the average distribution clause or none of them should.

Policies are sometimes issued to John Doe and/or Richard Roe. A policy so issued may cover one, two or three distinct interests in the property described therein, to-wit:—It may cover the interest of John Doe individually, the interest of Richard Roe individually, and the interest of both jointly. But if the policy be subject to co-insurance or reduced rate average conditions, it is only proper that the combined value of all the interests should be taken as the basis for their application.

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Although the form "John Doe and/or Richard Roe" has come into use quite generally during recent years, it is doubtful whether it is any broader in its cover than a policy issued to "John Doe and Richard Roe, as interest may appear"; in fact, good argument might be advanced in support of the view that a policy so issued would be more comprehensive and protective to the insured than one issued to "John Doe and/or Richard Roe," unless the latter should also contain the words "as interest may appear."

If one of the parties violates the conditions of the policy it will be void only as to his individual interest, and might be as to the joint interest, but not as to the individual interest of the party not participating in the violation. A possible exception to this general statement should perhaps be noted, for it may be that the few states which have declared unqualifiedly in favor of the doctrine that the policy is indivisible, and those which have decided in favor of conditional indivisibility, may hold that if it is void as to one interest, it is void as to all. It is also possible, however, that they might differentiate a policy covering several different interests from one covering several different items. About one-half of the states, however, which have passed on the question have held to the view that the policy is divisible, notwithstanding the plain provision. "This entire policy shall be void, etc." This opinion evidently assumes that sufficient significance is given to the word "entire" if it is construed as applicable to specific items of the policy instead of the entire instrument.

The question is frequently asked as to how a draft in payment of a loss under a policy so issued should be drawn in order to fully protect the company. The opinion is quite general among underwriters and adjusters that when paying a loss the draft should be made out precisely as the policy is written, without any variation or shadow of turning, and as a general rule this is correct. But is this true in respect of a policy issued to "John Doe and/or Richard Roe?" The answer to this question depends on the answer to two others:

First:—Does a draft so drawn require the endorsement of both parties, or can the insurer be legally compelled to honor it upon the endorsement of either?

Second:—If a draft so drawn is honored upon the endorsement of one of the parties only, will the insurer thereby secure a full re-

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lease, or can it be compelled to respond to a subsequent claim by the party who did not endorse the draft?

The opinion seems to be that the endorsement of one of the parties will be sufficient to enable said endorser to collect, and that the insurer will not be relieved of liability in respect of any later claim by the other party to the contract. If these conclusions be correct, is it evident that the insurer cannot safely issue a loss draft in the manner indicated, and that in the absence of a written release or authorization from one of the parties, the draft should be issued in the names of both "John Doe and Richard Roe," omitting the word "or."

If the draft is drawn in the name of "John Doe and/or Richard Roe," several possibilities present themselves, to-wit:

(1) If the loss is confined to the property belonging to one party only, who files his claim, and the draft falls into the hands of the other party, who collects on his own endorsement, the company is not released.

(2) If claim is made by both parties for loss on property belonging to each individually, and the draft is endorsed by one only, who makes collection, the company is not released as to the interest of the other.

(3) If claim is made by one or both parties for loss on personal property belonging to both jointly, and the draft is endorsed and collected by one only, the Company is released as to the joint property. This, however, is not necessarily so with respect to real property.

(4) If claim is made by one party only for the full face of the policy, for loss on property belonging to himself individually, and the draft is endorsed by him only, and collection made, and if a later claim is also made for the full face of the policy by the other party for loss on his individual interest in the property, the insurer would be compelled to pay the second claimant to the extent of his ratable interest in the policy. In other words, in such circumstances the insurer will have the privilege of paying out probably one hundred and fifty percent of its policy in settlement of the two claims.

(5) If claim is made by one party only for loss on his individual interest in the property, and the other party gives a release or authorizes payment to the first party, the draft could with perfect safety be made payable to said first party only, or it could be made payable to both jointly, in the form "John Doe and Richard Roe,"

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but it would not be absolutely safe to issue it in the names of both with the conjunctions "and/or" for, as above stated, if it should happen to fall into the hands of the wrong party, who endorses and collects, the company would not be released.

Is the property-owner absolutely safe in accepting a policy in the form "John Doe and/or Richard Roe?" This depends on circumstances. Assuming that the value of all interests must be the basis for the application of co-insurance conditions in all cases, if both parties to the contract are so situated with respect to the property that they are at all times fully posted as to the total value at risk, so that the amount of joint insurance can be regulated in accordance with their co-insurance necessities, they have nothing to fear on that score, but if either one or the other is not so situated, he runs the risk of being a co-insurer in the event of loss.

In those states which have held unqualifiedly that the policy is divisible the assured may safely accept policies in the form "John Doe and/or Richard Roe," but in those states which have held to the contrary, one party may possibly be running the risk of having the entire contract rendered void by some act on the part of the other.

It is for the parties insured to determine for themselves whether or not the advantages of this form outweigh the disadvantages, but when a policy is so issued the insurers are entitled to a full and complete release in the event of loss, even though the giving of same may at times cause one or both of the parties some inconvenience.

The safest course, and in fact the only absolutely safe course for the insurer, is to issue the loss draft in all instances in the form "John Doe and Richard Roe," thereby securing a release as to each individual interest, and the joint interest, if any.

Virtually every insurance company doing business is requested with more or less frequency, when the loss is less than \$100, and sometimes when it is more, to eliminate from the loss draft the name of the mortgagee to whom the loss is payable, on account of the difficulty attendant upon securing his receipt and endorsement. In most instances this can be done with comparative safety, but inasmuch as the loss payable clause is placed on the policy at the request of the insured, the insurance company should not be asked to ignore the request after it has become a contractual obligation and assume all responsibility therefor. The possible inconvenience connected with securing the mortgagee's release is well known when the

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policy is issued, and if the parties do not desire small losses paid to the mortgagee, it can be very easily arranged by making loss if any above a certain fixed amount payable to him as his interest may appear, and in some instances this is done.

If a policy covers on building and stock under separate items and it is the desire of the parties that the loss if any on building only shall be payable to a third party, it should so state, otherwise the loss under the entire policy will be payable to him.

Is the insurer liable for loss when property owner has released railroad company from liability? When the insured has, *prior to issue of the policy*, released a railroad company or wrong doer from liability for fire due to negligence or other cause, and fails to advise the insurer of such release, has he concealed or misrepresented any material fact or circumstance which precludes recovery from his insurer; in other words where the insured has by his own act deprived the insurer of its subrogation rights, is it a good defense to an action on the policy?

In England in the case of *Tate v. Hyslop* (1884, 15 C. B. Q., 3688 Eng.), the Upper Court reversed the finding of the Lower Court and held that when the insured released the common carrier from liability (except negligence) and knew or should have known that the underwriters charged a higher premium on goods carried under such conditions, the insured's failure to disclose such release would, (and in this case did) defeat recovery from the underwriters.

There are several American decisions bearing on the subject, among which may be mentioned the following:

Pelzer v. St. Paul F. & M. Ins. Co., USCC. 19 Ins. Law Journal, p. 372; 41 Fed. 271;

Pelzer v. Sun Insurance Office, South Carolina S. C. 21 Ins. Law Journal, p. 952;

Greenwich Ins. Co. v. L. & N. Ry. Co., Ky., 1902. Vol. 31 Ins. Law Journal, p. 298; 112 Ky. 598; 66 S. W. 411.

The Courts of this country have not been as generous to the underwriters as the English courts, but from an analysis of the decisions, we feel warranted in drawing the following conclusions, viz:

Such agreements are valid if there is a proper consideration therefor, and they are not against public policy.

When the insured has, previous to the fire, and before the issue of the policy, released the railroad company from liability and neglected to disclose such fact to the insurer when applying for insurance, it is a question for the jury to determine whether the failure to make such disclosure was concealment of a material fact, and

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where the insurers discriminate against property subject to such release to the extent of charging a higher rate, and this fact is known to the insured, but not to the insurer or his agent, and he fails to pay the higher rate and have notice of release endorsed on the policy, there would be a reasonable chance of defeating the claim on this ground; but where there is no such discrimination on the part of the companies, it would seem that the insurer would have no hope of a successful defense.

All courts which have passed on the question, with the exception of the Supreme Judicial Court of Massachusetts, the Court of Errors and Appeals of New Jersey, the United States Supreme Court and the English Courts (all of very high calibre), have decided that a fact known to an agent at the time the policy is issued cannot be taken advantage of by the insurer as a defense, but most courts have held that a fact coming to the knowledge of an agent after a policy has been issued, must be endorsed in writing on the policy in order to be binding upon the insurer.

If, therefore, the agent of the insurance company is aware of the fact that a release has been given by the property owner to the railroad company when he issues the policy, the insurance company, in most states would be estopped from setting up this fact as a defense, but in the states of Massachusetts and New Jersey, or where a case might be transferred to the Federal Court, the insurance company could take advantage of this defense.

When, after the issue of the policy, the insured enters into a contract with a railroad company, agreeing to hold it harmless from any liability from loss by fire, there can be no recovery against the insurer (Down's Farmers Warehouse Association v. The Pioneer Mutual Insurance Association, Washington, S. C., 35 Ins. Law Journal, p. 273).

It is the practice of the insurance companies to make an extra charge of from five to fifteen percent of the annual premium in the Northern States, and as high as twenty-five percent in the Southern States, on account of the existence of such agreements, and notwithstanding the well-known inclination of the courts to favor the insured, it would be the part of wisdom for him to pay the additional premium and be fully protected by having the following endorsement made on his policies: "In consideration of \$. Dollars, additional premium, notice is hereby accepted that the assured has waived the right of recovery from any damage by fire occurring to the property described herein or affected thereby."

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There are two kinds of insurance which have in recent years become quite popular, to-wit: use and occupancy insurance and profit insurance.

The term "use and occupancy" is somewhat vague and indefinite. It usually involves the idea of earnings and profits, but they are not necessarily synonymous terms. Use and occupancy insurance is analogous to rent insurance or profit insurance, but it is broader than either, as the insurance companies discovered in the Buffalo Elevating Company case several years ago (*Michael v. Prussian National Insurance Company*, 171 N. Y. 25), where the Court permitted the insured to collect over \$60,000 for an alleged loss of use, a large part of which was not really sustained, because the insured, as members of a pool, composed of many elevator owners, was by agreement to receive, and subsequently did receive, their full share of the pool earnings in spite of fire destroying the elevator in question.

Use and occupancy insurance is adapted more particularly to manufacturing risks and profit insurance to mercantile risks, although it is customary for manufacturers to take out profit insurance on finished goods, sold or contracted for. There has been a feeling, which still exists in some quarters, that this class of insurance has a tendency to increase the moral hazard, but probably on account of the discriminating care on the part of the insurers in selecting their risks, the record thus far has failed to justify these fears.

This class of insurance should not be written indiscriminately. In fact it would seem to be against public policy for it to become universal. It should not be granted to any individuals, firms, or corporations, except those of the highest standing, doing a profitable business, and it calls for the utmost good faith on the part of the contracting parties.

In a distant city some time ago, a comparatively small fire occurred in the assembling department of a large manufacturing plant which consisted of sixteen buildings. This department was the one which of all others, could be shut down and discommode the insured the least, and on the basis of the payroll, it constituted as a factor in production a little over five percent of the plant.

The adjusters figured the actual use and occupancy loss at less than \$1,000, but claim was presented for \$27,000 or \$9,000

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per day for three days, just as if the entire plant had been thrown out of commission; and in addition to this, \$9,000 for profit on stock which had been destroyed, making a total claim of \$36,000 which modest figure was subsequently raised by the filing of amended proofs for \$61,000.

The form provided that if any of the buildings or the contents thereof should be so damaged, destroyed or disabled so as to entirely prevent the insured from producing "finished goods," the companies should be liable per day for each working day of such prevention, for an amount not exceeding the net average daily yield of the plant for three hundred working days immediately preceding the fire. It also contained the usual provision in regard to partial prevention. It did not, however, contain any element of co-insurance and the insurance actually carried amounted to only thirty-five percent of the annual net profits.

The insured contended, not that they were entirely prevented from carrying on their business of manufacture, but that they were entirely prevented from producing "finished goods"—as if the production of finished goods did not require the use of the entire plant, but only the finishing department. During these three days they were producing finished engines, finished transmissions, finished bodies, and all such parts, but in the opinion of the insured's counsel, all this counted for naught, because they were in the business of producing finished automobiles.

The claim was finally compromised for \$10,000, but if the word "finished" can, in a given case engross the attention of three firms of attorneys, consume several thousand dollars in expenses, and protract the adjustment of a three days' partial loss for fifteen months, it would surely seem as if it were a good one to eliminate from the use and occupancy form.

There are many use and occupancy forms in current use which it will be impossible even briefly to analyze. In fact, use and occupancy insurance and the kindred subjects of rent, rental value, leasehold and profit insurance if fully considered, would each possess in itself sufficient material for a special paper.

When insuring commissions and/or profits the form should limit the liability of the insurer to not exceeding a certain percent of the sound value of the stock, and it should also contain a stipulation that the loss of commissions and/or profits shall

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not, in any event, exceed said percent of the amount of damage which the merchandise itself shall be found to have sustained, irrespective of whether said damage be ascertained by agreement, by appraisalment, or whether the stock be surrendered to the companies covering same, and the net loss ascertained through sale of the salvage. The policy should also be subject to average or co-insurance conditions.

The following "market value" clause is now frequently used in connection with lumber risks:

It is understood and agreed that in event of loss or damage to lumber, the basis of settlement and application of the average (co-insurance) clause shall be the market value at.....the day of the fire, less cost of transportation and marketing at the time and place of fire.

The following is used in policies covering on stock in tanneries:

It is understood and agreed that in the event of loss or damage to the property hereby insured the basis of settlement on tanned leather, finished, unfinished or in the rough, shall be the market price of similar leather in Boston, Mass., the day of the fire, less cost of finishing and transportation.

and somewhat similar clauses are inserted in policies covering on whiskey, sugar and other staple products in the hands of a manufacturer.

The Supreme Court of Michigan, in 1892, (*Mitchell v. St. Paul German Ins. Co.*, 92 Mich, 594), and the Texas Court of Civic Appeals, in 1898, (*Hartford Fire Ins. Co. v. Cannon*), decided that the basis of indemnity for lumber is the market value. The Supreme Court of Pennsylvania had decided that the "Actual cash value of sewing machines was the cost to the insured, who was a manufacturer, to reproduce them." (*Standard Sewing Machine Co. v. Royal Ins. Co.*, 201 Pa. State, 645). But when the same Court ran up against whiskey, because of the peculiar nature of that commodity, it staggered and fell into the market value column. (*Frick v. United Firemen's Ins. Co.*, 218 Pa. State, 409).

The United States Circuit Court of Appeals followed with a similar decision (*Mechanics Ins. Co. v. C. A. Hoover Distilling Co.*, vol. 40 Ins. Law Journal, p. 347; 182 Fed. 590) so that unless the parties to the contract agree that the words "actual cash value" and "cost to replace," as applied to goods in the hands of a manufacturer, shall be construed to mean "cost to reproduce," there appears to be no good reason why the market value clause should not be used in policies covering on lumber and whiskey at least, for it is more than probable that other

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jurisdictions will follow the precedents already established and that the companies will be under the necessity of settling future losses thereon on that basis, whether the policies contain such a provision or not.

To just what extent the judicial inclination may feel impelled to go in favor of market value as applied to goods in the hands of a manufacturer in construing the New York Standard Policy remains to be seen, but in the meantime the market value clause should not be inserted in policies issued to manufacturers except on risks where the companies would, if liability were limited to cost of production, be perfectly willing to write profit insurance. After all, the difference between having cost of production and profit merged in one set of policies and having policies covering each separately is not very great; in fact, in principle, the difference is the same as that between blanket and specific insurance, and in cases where insurance of both cost and profit are not objectionable, the terrors of the market value clause would be in a large measure neutralized by average or co-insurance conditions, and no such risk should be written unless subject to such conditions.

It would be interesting to consider forms covering common carrier liability, improvements and betterments, leasehold interest, mortgagee's interest, rents, rental value, reinsurance; also clear space, iron safe and three-fourth value clauses; policies issued to heirs, administrators, estates, etc. But it was difficult enough to know where to begin this subject, and it is still more difficult to know where to stop.

In general, policy forms contain many superfluous words. For instance, in that relic of the past commencing: "On household and kitchen furniture, useful and ornamental," five words out of the eight are unnecessary, and in that other inheritance from our ancestors, reading: "On merchandise, hazardous, non-hazardous and extra hazardous," six words out of the eight are redundant, and the same criticism will apply to a large majority of the forms in current use. The longest form may afford the shortest indemnity, and a good form can be very materially weakened by the injudicious addition of words, although it is better to use too many than too few. Vital points should be covered and useless phrases omitted. The three graces of the ideal insurance form are clearness, conciseness and completeness.

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One of the best things in the New York Standard Policy is on the back of it: "It is important that the written portions of all policies covering the same property read alike. If they do not, they should be made uniform at once." If proper attention were given to this admonition, the vocation of the apportionment expert would be gone and some of the troubles that now vex us would be at an end.

APPENDIX

FORMS

Forms used in connection with loss adjustments at San Francisco following the earthquake and fire of April 18-21, 1906.

SUB-COMMITTEE REPORT.

Claim No. _____ Claimant _____ Location _____
To the Attorneys of the Respective Companies interested in the Above Claim.
Gentlemen:

The undersigned having proceeded under a non-waiver stipulation to investigate the above claim do now render to you the following report based upon information thus far obtained:

DESCRIPTION

Item	Sound Value Before Earthquake	Visible Salvage
1	\$	\$
2		
3		
4		
5		
6		
7		

I. State occupancy of the building, whether it contained any property prohibited by any policy issued thereon or therein—whether claimant was the sole owner—and whether there were any mortgage or liens upon the property real or personal.

II. Total Insurance, \$

Attach Schedule.

III. State fully the condition of the building immediately preceding the fire, attach photographs and affidavits and give all information as to what parts, if any, of the building had fallen at that time.

IV. All information as to the condition of the contents of the building at the same point of time.

V. All information relating to the nature and extent of the damage done to the property by the earthquake. State your opinion as to the amount of that damage and how far the insured agrees in the same.

VI. Give all information you obtain relating to the damage, destruction, or appropriation of the property. If by order of civil authority, state so; if not, by whose authority.

VII. If property was stored in a bonded warehouse, state details with reference to the payment of duties made thereon.

Sub-Committee.

To the Companies interested:

We have examined the foregoing report and

Attorneys.

This form of sub-committee report contained a special provision for Non-Waiver Stipulation, reading as follows:

WHEREAS, It is claimed by the undersigned policy holder that he sustained loss and damage by the catastrophe, which occurred in San Francisco, California, on or about the 18th day of April, 1906:

NOW, THEREFORE, It is hereby stipulated and agreed between the said policy holder and the undersigned Companies that said Insurance Companies shall cause adjusters of losses to proceed to investigate and ascertain the amount of the sound value and loss and damage, if any, sustained by the said Claimant, and that this stipulation and such investigation and ascertainment is, and shall be, without any reference whatever to the question of the Insurance Companies' liability, and shall not be construed as an admission of any liability whatever, or as a waiver of any provision of any policy or of any right or exemption under the same, or a waiver of any other right by the Claimant or by any of said Companies.

Executed in duplicate this day of 1906.
.....
.....

Accompanying the foregoing sub-committee report was an Adjuster's Agreement, reading as follows:

Pursuant to the non-waiver stipulation entered into, the sound value of the property described in the policies referred to therein immediately preceding

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the earthquake of April 18, 1906, and the amount of salvage thereon are hereby mutually agreed to be as follows, subject to all the terms and conditions of the policies:

	Sound Value	Salvage
On	\$	\$
"	\$	\$
"	\$	\$
"	\$	\$
"	\$	\$
"	\$	\$
"	\$	\$
.....	\$	\$
.....		Claimant.
.....		Sub-Committee.

Forms used in connection with adjustment of losses in Black Tom Island, N. J., casualty July 30, 1916.

NON-WAIVER STIPULATION.

With reference to the above mentioned casualty and to the loss or damage caused thereby, it is claimed by the undersigned policyholder that such loss or damage is a direct loss or damage by fire as provided in the policy of insurance of the undersigned insurance company, while the undersigned insurance company is unable to determine whether such claim is well founded or whether such loss or damage, in whole or in part, was due to explosion or to a cause or agency, for loss by which, as provided in said policy of insurance, said company is not liable; therefore.

IT IS HEREBY STIPULATED that no action which may be taken by any of the undersigned in ascertaining or determining, or in restricting the amount of any loss or damage to the property described in said policy of insurance, or in any handling or protecting of such property from further damage, shall be considered in any way as recognizing that such loss or damage was a direct loss or damage by fire within the meaning of said policy of insurance, or shall be deemed to impair, waive or invalidate any of the terms or conditions of said policy or the rights of any party thereto.

Dated.....1916.

Policyholder.

Insurance Company.

ADJUSTMENT AGREEMENT.

IT IS HEREBY STIPULATED AND AGREED by and between.....
.....of the first part, and.....

.....each acting for itself and not as agent for the other, and each as party of the second part, that the actual net sound cash value of the property of the party of the first part on the 29th day of July, 1916, which is more particularly described in a certain policy or policies of insurance issued by the respective parties of the second part as.....

.....or as more particularly described in any schedule attached hereto, and the actual direct loss and damage caused thereto by the Black Tom Island casualty, which casualty occurred during the night of July 29-30, 1916, are respectively as follows, or as more particularly described in any schedule attached hereto:

Actual Net Sound Cash Value...\$.....

Actual Direct Loss and Damage...\$.....

IT IS FURTHER STIPULATED AND AGREED that the foregoing determination of sound value and of loss and damage shall not be considered in any way as a recognition by the party or parties of the second part that such loss or damage was a direct loss or damage by fire within the meaning of said policy or policies or as admitting that any of said policies was a valid outstanding contract of insurance and does not in any respect waive any of the provisions or conditions of said policy or policies, or any forfeiture thereof, or the proof of such loss and damage therein required.

The determination herein agreed upon is a determination of sound value and of loss or damage within the Non-Waiver Stipulation heretofore entered into, subject to which stipulation this agreement is made.

New York.....1916.

APPRAISAL AGREEMENT.

IT IS HEREBY STIPULATED AND AGREED by and between.....
.....of the first part, and.....

.....each acting for itself and not as agent for the other, and each as party of the

THE FIRE INSURANCE CONTRACT

second part, that..... designated
by the part of the first part, and.....
designated by the part of the second part, shall ascertain the sound actual cash
value of the property of said party of the first part, on the 29th day of July,
1916, which is more particularly described in a certain policy or policies of
insurance issued by the respective parties of the second part as.....

.....
or as more particularly described in any schedule attached hereto, as well as the
actual direct loss or damage caused thereto by the Black Tom Island casualty,
which casualty occurred during the night of July 29-30, 1916; that the said two
appraisers shall first select a competent and disinterested person who shall act
as umpire where the appraisers fail to agree and the said two appraisers together
shall then estimate and appraise the loss, stating separately sound value and
damage, and, failing to agree, shall submit their differences to the said umpire;
and the award, in writing, of any two shall determine the amount of such sound
value and loss. Such loss or damage shall be ascertained or estimated according
to the actual cash value of said property at the time of the occurrence of said
casualty, with proper deduction for depreciation however caused, and shall in no
event exceed what it would then cost the insured to repair or replace the same
with material of like kind and quality, but neither this agreement nor such appraisement
and award shall be considered in any way as a recognition by the
party or parties of the second part that such loss or damage was a direct loss or
damage by fire within the meaning of said policy or policies or as admitting that
any of said policies was a valid outstanding contract of insurance, or as waiving
in any respect any of the provisions or conditions of said policy or policies of
insurance or any forfeiture thereof, or the proof of such loss or damage therein
required. The respective parties hereto shall pay the appraiser respectively
selected by them and shall bear equally the expenses of the appraisal and
umpire.

The award herein provided for shall be a determination of the sound value
and of loss or damage within the Non-Waiver Stipulation heretofore entered
into, subject to which stipulation this agreement is made.

New York.....1916.
Claimants. Insurance Companies.

APPOINTMENT OF AN UMPIRE.

We, the undersigned, do hereby appoint.....
as umpire, as provided for in the within Agreement.....1916.

Appraisers.

DECLARATION.

State of.....
County of..... ss.:

We, the undersigned, do solemnly swear that we are not interested, either
directly or indirectly, as partners, creditors, or otherwise, or related to either
of the parties to the foregoing agreement; that we will act with strict impar-
tiality in making an appraisement agreeably to the foregoing appointment, ac-
cording to the best of our knowledge, skill and judgment.

Witness our hands, this.....day of.....A. D., 1916.

Appraisers.

Umpire

Sworn to before me by said.....
and subscribed by.....
in my presence, this day of.....A. D. 1916.

AWARD.

We, the undersigned, pursuant to the within appointment, DO HEREBY
CERTIFY that we have truly and conscientiously performed the duties assigned
us, agreeably to the foregoing stipulations, and have appraised and determined
the actual sound cash value of said property on the 29th day of July, 1916, and
the actual direct loss and damage thereto by said Black Tom Island casualty,
to be respectively as follows, or as more particularly described in any schedule
attached hereto:

Actual Net Sound Cash Value.\$.....

Actual Direct Loss and Damage.\$.....

Witness our hands, this.....day of.....1916.

Appraisers.

Umpire

APPENDIX—FORMS

SUBROGATION RECEIPT AND AGREEMENT.

THIS AGREEMENT, made the.....day of.....
 1916, by and between.....
 (hereinafter
 called the Policyholder), party of the first part, and.....
 (hereinafter called the Company), party of the second
 part, WITNESSETH:

FIRST: In consideration of the payment to the Policyholder by the company of the sum of..... (\$.....), the receipt of which is hereby acknowledged, the Policyholder hereby releases and discharges the Company from all claims and demands whatsoever for loss or damage by the above mentioned casualty of July 30, 1916, and subsequent days, to property described in policy No....., issued by the Company.

SECOND: In consideration of such payment and of other good and valuable consideration the Policyholder, at the request of the Company, by an instrument of even date herewith, has assigned and transferred, as in said instrument set forth, any and all claims, demands, and causes of action whatsoever against any and all person or persons, firm or firms, corporation or corporations, arising from or connected with such loss or damage.

THIRD: In connection with such assignment, it is mutually agreed as follows:

1. That the Policyholder shall receive a pro rata interest in the net proceeds derived from such claims, demands or causes of action, such pro rata interest to be the unpaid percentage or percentages specified in a certain offer of compromise dated October 7th, 1916, made on behalf of the Company by a certain Special Committee on Black Tom Island Disaster.

2. The Policyholder shall be under no liability for contribution to the expense of any enforcement of such claims, as hereinafter provided, except from the proceeds thereof.

3. No action taken or failure to act by the assignee or assignees of such claims hereinabove provided for, or by the Company, in connection with any negotiation, settlement, compromise or legal proceedings or discontinuance or abandonment of any of the same, shall be questioned in any respect by the Policyholder, it being the intention to give to the Company or the said assignee or assignees the same control as if they were solely entitled to the proceeds of any of such claims.

4. The term "net proceeds" as used herein means the proceeds received on account of such claims, less such expenses as the assignee or assignees, or the Company, shall, in their or its sole discretion, approve.

5. The Policyholder agrees, at the request of the Company, to execute any further instruments necessary or desirable to carry out the intent of this agreement and to render, without expense to the Company, all possible aid in the enforcement of such claims.

6. Any salvage of the property hereinbefore described recovered subsequent to the execution of this agreement shall belong to the Company and to any other insuring companies concerned.

IN WITNESS WHEREOF the parties hereto have executed this agreement the day and year first above mentioned.

Witness.....
 Policyholder.
 Company.

Acknowledgment when policyholder is an individual)

STATE OF NEW YORK, }
 City of New York, } ss.:
 County of New York. }

On this.....day of....., 1916, before me personally appeared
 to me personally known and known to me to be the individual described in and
 who executed the foregoing instrument as Policyholder, and acknowledged that
 he executed the same for the uses and purposes therein mentioned.

(Acknowledgment when policyholder is a corporation)

STATE OF NEW YORK, }
 City of New York, } ss.:
 County of New York. }

On this..... day of....., 1916, before me personally came
 to me known, who being by me duly sworn, did depose and say that he resides
 in; that he is the.....
 of the

THE FIRE INSURANCE CONTRACT

the corporation described in and which executed the above instrument as Policyholder; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation and that he signed his name thereto by like order.

(Acknowledgment when policyholder is a co-partnership)

STATE OF NEW YORK,
City of New York,
County of New York. } ss.:

On this.....day of....., 1916, before me personally came
....., a member of the
firm of....., described in the
foregoing instrument as Policyholder, to me known and known to me to be a
member of the said firm and the person who executed the said agreement, and
acknowledged to me that he executed the same on behalf of said firm.

(Acknowledgment by Company.)

STATE OF NEW YORK,
City of New York,
County of New York. } ss.:

On the.....day of.....1916, before me personally came
..... to me known, who, being by me duly sworn, did depose and say that he resides
in.....; that he is the
..... of the
the Corporation described in and which executed the above instrument as Com-
pany; that he knows the seal of such corporation; that the seal affixed to said
instrument is such corporate seal; that it was so affixed by order of the Board of
Directors of said corporation, and that he signed his name thereto by like order.

Forms for current use in connection with New York Standard
policy:

1. Appraisal Agreement for use with the new, or 1917, New
York State Standard policy;
2. Appraisal Agreement for use in connection with the old,
or 1886, New York Standard policy, which was gen-
erally adopted by other states;
3. Non-Waiver Agreement;
4. Subrogation Receipt;
5. General Release, to be executed by corporation;
6. General Release, to be executed by an individual or part-
nership.

(1) APPRAISAL AGREEMENT

IT IS HEREBY stipulated and agreed by and between.....
of the first part, and.....
each acting for itself and not as agent for the other, and each as party of the
second part, that....., designated by the part.....of the first part,
and....., designated by the part.....of the second part,
shall ascertain, pursuant to the terms and conditions of the polic... of insur-
ance issued by said comp..... to the party of the first part, the sound actual
cash value of the property of said party of the first part, on the.....
day of....., 192, which is more particularly described in the policies
as.....
as well as the actual direct loss and damage caused thereto by a fire which
occurred on that day and/or, if this agreement contemplates personal property,
in such case damage if any caused by removal from premises endangered by
fire; that the said two appraisers shall first select a competent and disinterested
person who shall act as umpire, and the said two appraisers together shall then
estimate and appraise the loss, stating separately sound value and damage to
each item, and failing to agree, shall submit their differences only, to the umpire.
An award, in writing, so itemized, of any two when filed with the insurance
companies above designated shall determine the amount of sound value and
of loss or damage. Such loss or damage shall be ascertained according to the
actual cash value of said property at the time of the occurrence of said fire,
with proper deduction for depreciation, and shall in no event exceed what it
would cost to repair or replace the same with material of like kind and quality
within a reasonable time after such loss or damage, without allowances for any

APPENDIX—FORMS

increased cost of repair or reconstruction by reason of any ordinance or law regulating construction or repair and without compensation for loss resulting from interruption of business or manufacture, but such appraisal does not in any respect waive any of the provisions or conditions of said policy or policies of insurance, or any forfeiture thereof, or the proof of such loss and damage required by the policy or policies of insurance thereon.

Each appraiser shall be paid by the party selecting him and the expenses of appraisal and umpire shall be paid by the parties equally. m

New York, ...192....

APPOINTMENT OF A THIRD PERSON

We, the undersigned, do hereby appoint.....
as umpire, as provided for in the within Agreement.
.....192....

..... } Appraisers
..... }

DECLARATION

State of }
County of } ss.

We, the undersigned, do solemnly swear that we are not interested, either directly or indirectly, as partners, creditors, or otherwise, or related to either of the parties to the foregoing agreement; that we will act with strict impartiality in making an appraisal agreeably to the foregoing appointment, according to the best of our knowledge, skill and judgment.

WITNESS our hands, this.....day of.....A. D., 192....

..... } Appraisers
..... }
..... Umpire

Sworn to before me by said.....and subscribed by
.....in my presence, this.....day of.....A. D., 192....
.....

AWARD

We, the undersigned, pursuant to the within appointment, do HEREBY CERTIFY, that we have truly and conscientiously performed the duties assigned us, agreeably to the foregoing stipulations, and have appraised and determined the actual cash value of each item of said property on the.....day of.....192.... and the actual direct loss and damage thereto by the fire on that day, to be as follows, (see itemized schedule attached hereto) to wit:

Total Actual Net Cash Value.....
Total Actual Direct Loss and Damage.....

WITNESS our hands, this.....day of.....192....

..... } Appraisers
..... }
..... Umpire

The New York Board of Fire Underwriters' Form

APPRAISAL AGREEMENT

(2)

IT IS HEREBY stipulated and agreed by and between.....
of the first part, and.....
each acting for itself and not as agent for the other, and each party of the second part, that.....designated by the part....of the first part, and.....designated by the part....of the second part, shall ascertain, pursuant to the terms and conditions of the polic....of insurance issued by said comp....to the party of the first part, the sound actual cash value of the property of said party of the first part, on the.....day of.....192...., which is more particularly described in the policies as.....
as well as the actual direct loss or damage caused thereto by a fire which occurred on that day; that the said two appraisers shall first select a competent and disinterested person who shall act as umpire, and the said two appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and failing to agree shall submit their differences to the said umpire; and the award, in writing, of any two shall determine the amount of such loss. Such loss or damage shall be ascertained or estimated according to the actual cash value of said property at the time of the occurrence of said fire, with proper deduction for depreciation however caused, and shall in no

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event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality, but such appraisement does not in any respect waive any of the provisions or conditions of said polic.... of insurance, or any forfeiture thereof, or the proof of such loss and damage required by the polic.... of insurance thereon.

NEW YORK, ...192....

APPOINTMENT OF A THIRD PERSON

We, the undersigned, do hereby appoint.....
as umpire, as provided for in the within Agreement.
.....192....

DECLARATION

State of
County of } ss.

We, the undersigned, do solemnly swear that we are not interested, either directly or indirectly, as partners, creditors, or otherwise, or related to either of the parties to the foregoing agreement; that we will act with strict impartiality in making an appraisement agreeably to the foregoing appointment, according to the best of our knowledge, skill and judgment.

WITNESS our hands, this.....day of.....A. D., 192....

Appraisers

Umpire

Sworn to before me by said.....and subscribed by
.....in my presence, this.....day of.....A. D., 192....

AWARD

We, the undersigned, pursuant to the within appointment, do HEREBY CERTIFY that we have truly and conscientiously performed the duties assigned us, agreeably to the foregoing stipulations, and have appraised and determined the actual cash value of said property on the.....day of.....192.... and the actual direct loss and damage thereto by the fire on that day, to be as follows, to wit:

Actual Net Cash Value.....
Actual Direct Loss and Damage.....

WITNESS our hands, this.....day of.....192....

Appraisers

Umpire

(3) NON-WAIVER AGREEMENT

Whereas, an early ascertainment of the amount of both Sound Value and Loss or Damage, if any, is desired by both parties to this agreement:

It is hereby mutually understood and agreed by and between

.....part
of the first part and the.....of
.....and other Insurance Companies signing this agreement, or assenting hereto, part.....of the second part, that this agreement and/or any action taken by said part.....of the second part in investigating the cause of fire and/or investigating and ascertaining by appraisement or otherwise the sound value of and the amount of loss and damage to the property, described in the policies of the said fire Insurance Companies, situated caused by fire alleged to have occurred on..... of the part.....shall not waive or invalidate any of the conditions of the polic.....of the part.....of the second part, or any forfeiture thereof, and shall not waive or invalidate any rights whatsoever of either of the parties to this agreement.

The Intent of this agreement is to preserve the rights of all parties hereto and provide for an investigation of the fire and the determination of the sound value and the amount of the loss or damage, without regard to the liability of the part..... of the second part.

Signed in duplicate, this.....day of.....19....

APPENDIX—FORMS

(4) SUBROGATION RECEIPT

\$..... Received of the..... Agent.....
 by the hands of..... Agent.....
 the sum of..... DOLLARS,
 being in full of all claims and demands for loss and damage by fire on the
day of.....19.... to the property insured by
 Policy No..... issued at the.....
 Agency of said Company.

And in consideration of such payment the undersigned hereby assigns and
 transfers to the said Company each and all claims and demands against any
 person, persons or property, arising from or connected with such loss or dam-
 age, (and the said Company is subrogated in the place of and to the claims and
 demands of the undersigned against said person, persons or property in the
 premises,) to the extent of the amount above named.
 Dated this.....day of.....19..... at.....

(5) GENERAL RELEASE

(Corporation)

To all to whom these Presents shall come or may concern, Greeting;

Know ye, That

for and in consideration of the sum of.....Dollars,
 lawful money of the United States of America, to.....in hand paid by.....
 and other valuable considerations, the receipt whereof is hereby acknowledged,
 has remised, released and forever discharged and by these Presents does for
 itself, its successors and assigns, remise, release and forever discharge the said
its officers, attorneys, adjusters,
 agents, servants and employees, its and their successors, assigns, heirs, execu-
 tors and administrators, of all and from all, and all manner of action and
 actions, cause and causes of actions, suits, debts, dues, sums of money, accounts,
 reckonings, bonds, bills, specialties, covenants, contracts, controversies, agree-
 ments, promises, variances, trespasses, damages, judgments, extents, executions,
 claims and demands whatsoever in law or in equity, which against the said
its officers, attorneys, adjusters,
 agents, servants, or employees it ever had, now has or which its successors or
 assigns hereafter can, shall or may have for, upon or by reason of any matter,
 cause or thing whatsoever from the beginning of the world to the day of the
 date of these presents, and more especially (but without intending by this par-
 ticular clause to waive any of the foregoing provisions of this release) from
 any and all claims, actions, or rights of action of every kind, nature and de-
 scription whatsoever, whether on its Policy of Insurance or otherwise, arising
 either directly or indirectly by reason of the fire which occurred at the premises
In the Borough of.....
 in the City of....., on the.....day of
19...., or in any way whatever incidental
 thereto or to the investigation of the same.

In Witness Whereof, the said.....
 has caused its corporate seal to be hereunto affixed and these presents to be
 signed by its proper officer thereunto duly authorized this.....
 day of....., in the year of our Lord one thousand nine hun-
 dred and.....

ATTEST

State of

County of

} ss.

On this.....day of..... in the year one
 thousand nine hundred and..... before me personally came.....
 to me known, who being by me duly sworn did depose and say that he resides in
; that he is the..... of the.....
 the corporation described in and which executed the foregoing instrument; that
 he knows the seal of said corporation; that the seal affixed to such instrument
 is such corporate seal; that it was so affixed by order of the Board of Directors
 of said corporation, and that he signed his name thereto by like order.

(6) (Individual) GENERAL RELEASE

To all to whom these Presents shall come or may concern, Greeting,

Know ye, That

for and in consideration of the sum of.....Dollars,
 lawful money of the United States of America, to.....
 in hand paid by.....
 and other valuable considerations, the receipt whereof is hereby acknowledged,
 have remised, released and forever discharged and by these Presents do....for
heirs, executors and administrators, remise, release and forever dis-
 charge the said.....its officers, attorneys,
 adjusters, agents, servants and employees, its and their successors, assigns,
 heirs, executors and administrators, of all and from all, and all manner of ac-
 tion and actions, cause and causes of actions, suits, debts, dues, sums of

THE FIRE INSURANCE CONTRACT

money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims and demands whatsoever in law or in equity, which against the said.....its officers, attorneys, adjusters, agents, servants or employees..... ever had, now ha..... or which..... heirs, executors or administrators, hereafter can, shall or may have for, upon or by reason of any matter, cause or thing whatsoever from the beginning of the world to the day of the date of these presents, and more especially (but without intending by this particular clause to waive any of the foregoing provisions of this release) from any and all claims, actions or rights of action of every kind, nature and description whatsoever, whether on its Policy of Insurance or otherwise, arising either directly or indirectly by reason of the fire which occurred at the premises.....in the Borough of.....day of In the City of....., on the.....day of....., 19....., or in any way whatever incidental thereto or to the investigation of the same.

In Witness Whereof, ...have hereunto set hand.... and seal.... the.....day of in the year of our Lord one thousand nine hundred and.....

Sealed and Delivered in the Presence of.....

State of }
County of } ss.

On this.....day of.....in the year one thousand nine hundred and.....before me personally came and appeared.....to me personally known and known to me to be.....the person.....described in and who executed the foregoing instrument, and.....acknowledged to me that.... he.... executed the same.

MEMORANDUM OF VALUE AND LOSS New New York Board Form

....., 19....

Assured
Location
Property involved in claim
Date of fire

This memorandum is without admission of liability. The sound value of the property claimed to be insured and the loss thereon have been ascertained as shown below, without prejudice to any defenses and subject to all and singular the terms and conditions of the policies upon which claim is made.

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